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No. 90-1488

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: April 19, 1991

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Respondents Artist M., et. al, by their next friend, Patrick T. Murphy, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

JURISDICTION

On October 29, 1990, the Seventh Circuit affirmed orders of the District Court denying in part petitioners' motion to dismiss and granting respondents' motion for a preliminary injunction. The Court of Appeals denied petitioners' petition for rehearing with suggestion for rehearing en banc on December 20, 1990.

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes at issue are 42 U.S.C. §§ 671(a) and 1983, which are included in the appendix.

STATEMENT OF THE CASE

This action arises out of the State of Illinois' practices of failing to make reasonable efforts to preserve and to reunite families and of failing to provide case plans, case reviews, and appropriate monitoring to children in its care, all as required by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679a (the "AAA" or the "Act"). Petitioners, the Director and Guardianship Administrator of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), purport to fulfill these obligations through a system of their own design -- namely, by assigning a caseworker to each child under their care or supervision. Petitioners, however, regularly fail to assign caseworkers to these children and their families. As a result, as both the District Court and the Court of Appeals recognized, petitioners systematically violate their obligations under the Act, Pet. App. 19a, 53a-54a, and children under their care and supervision suffer from:

> an increased likelihood that [their] families would be broken up or remain apart, that [they] would be deprived of protective services, and that, in the absence of timely case plans and case reviews, [they] would be left in unnecessarily restrictive or dangerous placements, denied...essential visits with their parents and place[d] at risk of further injury.

Pet. App. at 19a (internal quotations omitted). To remedy petitioners' violations of the AAA, the District Court entered a minimally intrusive preliminary injunction, which the Seventh Circuit affirmed on appeal.

Respondents are children who are abused or neglected by their parents or whose parents are unable to care for them for a variety of reasons. In each of their cases, DCFS files a petition for adjudication of wardship in the Circuit Court of Cook County, Illinois, County Department, Juvenile Division ("Juvenile Court"). Based on the recommendation of investigators with DCFS' Division of Child Protection ("DCP"), the Juvenile Court then places many of these children in the agency's custody. In the remaining cases, the Juvenile Court orders the child to remain at home under DCFS' supervision ("protective order cases"). App. at 9-10, paras. 1-3.[1]

Under the system designed by petitioners, DCP investigators provide no family preservation, family reunification, or other services to these children and their families. Instead, DCFS chooses to provide a caseworker to each child to fulfill its obligations under the Act. Consequently, when DCFS assumes custody of a child, one of its caseworkers must be assigned in order to maintain the child's family ties, work toward reunification, and ensure the child's well-being. To those ends, under DCFS' system, the caseworker must search for relatives qualified to care for the child or locate a suitable non-relative placement; arrange appropriate counseling; complete school

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[1] In apparent disregard of Supreme Court Rule 14.1(k)(ii), petitioners omitted from their appendix the District Court's findings of fact, its July 24, 1989 memorandum opinion and order, and orders entered by the Court of Appeals, prior to its decision, remanding the case to the District Court for additional factual findings. Accordingly, respondents have included each of those documents in their appendix.

transfers where appropriate so the child's education is not interrupted; arrange family visitation; provide appropriate medical care; and generally assure the child's safety. The caseworker is also responsible for developing a written, individualized case plan and advising the Juvenile Court of the condition of the child and the family. Id. at 9-11, paras. 2, 4.

Similarly, DCFS delegates to its caseworkers the responsibility of securing family preservation services in protective order cases. Under DCFS' system the caseworker alone is responsible for arranging individual or family counseling to ease or eliminate the crisis that led to the child's mistreatment; homemaker and housekeeping services so that the conditions of the home will not require the child's removal; substance abuse programs to enable parents to attend to their children's needs; help in obtaining food, shelter and medical care; and monitoring of the child's safety at home. Id. at 12, para. 6.

DCFS contracts with private agencies to provide services in some protective order and custody cases. In these cases DCFS and the private agency share the responsibility for delivering services. Together, the DCFS caseworker and the private agency prepare a case plan and provide an administrative case review. The DCFS caseworker, however, retains ultimate responsibility for all facets of the case. The DCFS caseworker also remains responsible for ascertaining whether there are appropriate relatives with whom to place a child. Moreover, certain private agencies are unable to provide necessary services (such as

psychiatric hospitalization for a suicidal child). In those cases the DCFS caseworker is responsible for obtaining and authorizing such services. The DCFS caseworker may also be required to consent to familial visits. Finally, the DCFS caseworker is responsible for planning for the long-term care of children, particularly when the private agency provides only a short-term placement. Id. at 12-13, paras. 7-8.

Until DCFS has assigned a caseworker, it provides no services to respondents or their families. For example, a young child in DCFS' custody may be denied visits with her parents or siblings for several weeks. Others may be left in inappropriate placements such as shelters, even when appropriate relatives are interested in caring for them. Without a caseworker, some children are denied essential sex abuse treatment, grief counseling or psychiatric care. Many more are unable to attend school. Finally, without a caseworker some children remain indefinitely in DCFS' custody without any plan for their case. Id. at 13-14, para. 9.

Children who reside at home under DCFS' supervision are also denied family preservation services and protection when no caseworker is assigned. For example, without caseworkers, children who come under DCFS' supervision because their parents fail to provide adequate food may go hungry again and have to leave home. Parents who are ordered to obtain drug treatment by the Juvenile Court and are willing to do so in order to keep their children get no assistance in locating and enrolling in a drug treatment program. Children who are without an assigned

caseworker to make home visits may be further abused by their parents and may have to be removed from their families. Id. at 14-15, para. 11. In short, under its own system, DCFS cannot fulfill the Act's reasonable efforts, case plan, case review, and monitoring requirements after it initiates a case without assigning a caseworker.

In such cases DCFS' failure to provide caseworker-initiated services promptly is particularly harmful. Because family members are the most motivated during a time of crisis, immediate intervention is essential. Thus, in custody cases, the likelihood that children whom DCFS separates from their families will return home is directly related to the speed with which they receive reunification services. The longer DCFS delays in providing such services during this critical period, the more likely it is that the child will never return home. Thus, the goal of family reunification becomes more remote and less attainable when no caseworker is assigned. Similarly, when children remain at home, DCFS' failure to quickly provide family preservation services places them at risk and often results in their removal from home.

At the time respondents filed their complaint, DCFS regularly failed to assign caseworkers capable of initiating child welfare services for them and their families, both in protective order and in temporary custody cases. In most cases DCFS did not assign a caseworker until at least two weeks after the first Juvenile Court date. In many others DCFS failed to assign a caseworker at all during the first 30 to 45 days. In

some cases this gap lasted even longer. Id. at 15, para. 13. In protective order cases, the Juvenile Court, at the request of DCP investigators, often scheduled the first court hearing for a future date. Yet even in those cases, with advance notice of the impending Juvenile Court case, DCFS regularly failed to assign a caseworker promptly after the court case commenced.

After petitioners did assign caseworkers to them, respondents often lost the benefit of the assignment when DCFS transferred or terminated their caseworkers or when their caseworkers took leaves of absence or resigned. In these cases DCFS simply failed to assign a caseworker to replace the previous one. As a result, these children were again left for significant periods of time without a caseworker, and thus without family reunification, family preservation, and other child welfare services. Id. at 16, para. 15.

According to DCFS' own records, at the end of September 1988, over 200 cases in Cook County had been without an assigned caseworker for more than 30 days. DCFS records in November 1988 showed that 320 cases in Cook County had been unassigned for over 30 days, that 83% of those had been unassigned for over 60 days and that 63 cases had been unassigned for over 100 days. On December 13, 1988, the head of DCFS' Cook County operations wrote that unassigned cases in Cook County were on the rise. Id. at 17, para. 17.

Despite these conditions, DCFS did nothing to expedite the assignment of caseworkers to fulfill its family preservation, family reunification, case plan, case review, and monitoring

obligations to children and their families. DCFS simply failed to require its personnel to assign cases promptly. It also failed to develop a policy or procedure for reassigning cases of caseworkers who resign, transfer, or are absent for substantial periods of time. On the contrary, DCFS deliberately chose not to reassign many such cases. In many other cases DCFS made "paper assignments" by assigning a caseworker in name only -- one incapable, because of the size of his or her caseload, of providing appropriate family preservation or family reunification services, participating in a case review, developing a case plan, or adequately monitoring the child's safety. Id. at 17-18, paras. 18-19.

On December 14, 1988, respondents filed their complaint in the United States District Court for the Northern District of Illinois. These children alleged that petitioners' failure to assign them caseworkers promptly violated their rights, and those of similarly situated children, under the Act. Respondents sought declaratory and injunctive relief, both directly under the Act, through an implied cause of action, and under 42 U.S.C. § 1983. A subclass of petitioners -- those in respondents' custody -- also complained of violations of their rights under the Due Process Clause of the United States Constitution. On the same day respondents filed motions for class certification and for a preliminary injunction. The District Court exercised jurisdiction over the case pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

After granting the motion for class certification and expediting discovery, the District Court conducted a three day hearing on respondents' motion for a preliminary injunction in January 1989. The evidence revealed systemic problems in DCFS' caseworker assignment practices as described above and the resultant violations of respondents' rights under the Act. Respondents also showed the harm suffered by individual children who were entrusted to DCFS' care and supervision. In response, DCFS' witnesses described the plan which they had developed to reorganize the Department, purportedly designed to ensure prompt caseworker assignment.

The District Court initially accepted DCFS' assurances regarding its reorganization plan. Consequently, it deferred ruling on respondents' motion for a preliminary injunction for well over a year.

By July 1989 DCFS had implemented three of the four elements of its plan:

(a) the Early Response Package, which reduced the paperwork necessary to transfer a case from DCP to a caseworker;

(b) the expansion of its Interim Services Team ("IST") program, designed to allow DCFS to assign all new custody cases promptly to an IST caseworker before transferring them shortly thereafter to an area office; and

(c) the Family First Initiative ("Family First"), designed to provide intensive services to children remaining at home with their parents.

On July 16, 1989 DCFS completed the final element of its plan, the reorganization of DCP. Id. at 19, para. 20.

As time passed, however, it became apparent that the District Court's faith in DCFS' plan had been misplaced. First, significant delays persisted in assigning caseworkers at the outset of cases. By petitioners' own admission, one fourth of the cases sent to IST were not assigned a caseworker promptly. In the remaining cases, DCFS did not even know when children were assigned a caseworker. Id. at 19-20, paras. 21, 25. DCFS also failed to reassign a caseworker once IST had relinquished responsibility for a case. Id. at 19-20, paras. 22-23.

Moreover, neither IST nor the Family First program functioned as planned. In July 1989 approximately one-third of the new custody cases went directly from DCP to area offices without IST intervention, despite petitioners' assertions that all such cases would first be sent to IST. In those cases DCFS failed to assign a caseworker until, on average, ten days after the first Juvenile Court date. As for Family First, DCFS regularly left children whose cases were initially assigned to that program without a caseworker -- without regard for their continuing need for one -- after Family First ended its two to three month association with the family. Id. at 20, para. 24.

DCFS' heralded reorganization plan also failed to address the gaps created when caseworkers resigned, transferred, were fired or took leaves of absence. If a caseworker were absent for less than 30 days, the supervisor merely monitored the case without handling the everyday service needs of the family. When

caseworkers were absent for longer periods, DCFS' policy and practice continued to permit supervisors to leave cases unassigned for 30 or more days. Given the number and frequency of transfers and the high turnover rate of DCFS caseworkers, DCFS' unwillingness to remedy that problem was especially dangerous. Children whose cases were reassigned during a caseworker's absence did not fare any better, because petitioners reassigned those cases en masse to a single caseworker. Given the nature and volume of the reassignments, the caseworker could not provide services to those children and their families. Id. at 21, paras. 26-27.

Finally, even after implementation of its plan, DCFS failed to hold anyone in the agency accountable for assigning a caseworker promptly. DCFS assigned Mark Moses to monitor caseworker assignment, but it did not require him to take action when he learned of unassigned cases. Gloria Lewis, DCFS' Associate Deputy Director for Cook County Operations and the supervisor of its four area offices, received monthly reports listing unassigned cases, but she had no responsibility for ensuring the assignment of caseworkers to those families. DCFS gave John Goad and Chris Benson the responsibility of monitoring compliance with the Early Response Package, but they reviewed DCFS' performance only twice in all of 1989. Id. at 21-22, paras. 28-29.

Thus, instead of developing appropriate internal checks, DCFS simply relied on its expectations -- "wishful thinking," in the words of the District Court -- that cases would be assigned.

Id. at 22, para. 29. But its wishful thinking was not enough. Despite its reorganization, DCFS continued to deprive children and their families of caseworkers and the services and protections required by the AAA, which under DCFS' system, only the caseworkers could provide.

In the face of these problems, petitioners filed a motion to dismiss respondents' complaint. On November 21, 1989, the District Court granted the motion only as it related to respondents' constitutional claims. The District Court denied the motion in all other respects, holding that respondents stated a cause of action under the AAA -- both through an implied cause of action and under § 1983 -- particularly with respect to the Act's reasonable efforts requirement. Pet. App. at 35a-44a. Nevertheless, the District Court continued to defer to DCFS' reorganization plan and invited the Department to apprise the court of any progress in its implementation.

DCFS, however, made no progress. In November 1989 the Department began sending all new cases -- not merely new custody cases -- to IST. Id. at 32, Stip. 16. But logs from January and February 1990 (finally revised to reflect the date of caseworker assignment) demonstrated continuing delays there. DCFS did not assign a caseworker within five days of the first Juvenile Court date -- its stated goal -- in 56 of approximately 150 cases sent to IST in those two months. In February 1990 alone DCFS failed to meet its own five-day goal in 40% of the cases sent to IST and in 60% of those not screened in advance. Twelve per cent

were left unassigned for more than three weeks. Id. at 23, paras. 33-34.

Moreover, DCFS continued to leave cases unassigned, on the average, for nearly three weeks after IST completed its tasks. DCFS also failed to improve its policies or its practices regarding the reassignment of cases in the area offices. As a result, when caseworkers were absent, DCFS left their former cases unassigned for an average of 30 days. Id. at 24, para. 35.

System-wide caseworker assignment problems grew as well. The total number of unassigned cases grew from 232 on June 30, 1989, to 404 by the end of the year, parallelling the pattern of 1988. The number of cases unassigned for over 30 days doubled during the same period of time. Id. at 24, para. 36.

The District Court ultimately concluded that DCFS, despite its reorganization plan, continued to violate the AAA. Based on the evidence it had received over the previous 14 months, the court concluded that respondents had satisfied each of the requirements for the issuance of a preliminary injunction. Thus, on March 2, 1990, the District Court entered a preliminary injunction which prohibited petitioners from:

> (a) failing to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three working days of the time that plaintiffs' cases are first heard in Juvenile Court; and
>
> (b) failing to assign a caseworker capable of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case.

Pet. App. at 56a. Petitioners then appealed.

The Seventh Circuit affirmed the District Court in an opinion entered on October 29, 1990. The court below first affirmed the District Court's November 21, 1989 holding that respondents could enforce the AAA, both through an implied cause of action under the Act and under § 1983. The court then upheld the injunction as fully supported by the evidence. On December 20, 1990, the Seventh Circuit denied DCFS' petition for rehearing.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for a writ of certiorari. First, petitioners seek, in essence, an advisory opinion from this Court. They question only the Court of Appeals' decision affirming respondents' right to enforce the AAA under § 1983. They leave unchallenged the court's clearly articulate and equally correct holding that regardless of § 1983, respondents were entitled to the relief granted by the District Court under the AAA through an implied cause of action. Pet. App. 14a-18a. This Court's review, however, is limited to questions properly presented in the petition. Sup. Ct. R. 14.1(a). Therefore, regardless of how this Court answers the questions petitioners do present, the Court of Appeals' affirmance -- given its independent foundation in its implied cause of action holding -- must stand.

In addition, the decision below was correct and consistent with the decisions of this Court, the other courts of appeals, and the state courts. The Court of Appeals properly applied Wilder v. Virginia Hospital Association, ___ U.S. ___, 110 S. Ct. 2510 (1990), this Court's most recent § 1983 decision

regarding the Social Security Act (of which the AAA is a part), to the facts of this case. It correctly held that the respondents are beneficiaries of the AAA; that the AAA imposes binding obligations on States accepting its funding; and that the AAA's provisions are neither too vague nor too amorphous to be unenforceable. Pet. App. at 9a-13a. Thus, with Wilder clearly applicable here -- and in light of the broad construction to be afforded § 1983, Golden State Transit Corp. v. Los Angeles, 493 U.S. ___, 110 S. Ct. 444, 448 (1989) -- the Court of Appeals correctly concluded that respondents in DCFS' custody or under its supervision could enforce the requirements of the AAA.

Finally, the Court of Appeals' holding will have, at most, minimal impact on other States. The court held that when a State receiving funds under the AAA assigns to caseworkers exclusively the responsibility of making reasonable efforts and systematically fails to assign caseworkers to abused and neglected children and their families, a court may remedy that systemic deficiency by entering a minimally intrusive preliminary injunction. Id. at 16a-18a. Moreover, the injunction here is dependent on complex facts -- reviewed extensively by the District Court and again by the Court of Appeals -- regarding Illinois' own child welfare policies and practices. In view of the AAA's deference to States, those policies and practices are unlikely to recur elsewhere, thereby minimizing the import of the Court of Appeals' decision. Given these reasons, and given this Court's presumption against reviewing interlocutory orders, Goldstein v. Cox, 396 U.S. 471, 478 (1970), certiorari should be denied.

I. PETITIONERS HAVE NOT PROPERLY CHALLENGED ONE OF THE TWO INDEPENDENT GROUNDS FOR THE COURT OF APPEALS' DECISION, THEREBY RENDERING CERTIORARI INAPPROPRIATE.

A. Petitioners Have Waived Review of the Court of Appeals' Holding That Children May Enforce the AAA Through an Implied Cause of Action.

In affirming the preliminary injunction, the Seventh Circuit expressly and independently held that children in DCFS' custody and children under DCFS' supervision may enforce the AAA directly through an implied cause of action. The court correctly applied the four-part test of Cort v. Ash, 422 U.S. 66, 78 (1975), and found that respondents stated a cause of action independent of their rights under § 1983: "[E]ven if the plaintiffs could not pursue their claims under Section 1983, we conclude that the AAA contains an implied private right of action." Pet. App. at 14a.[2]

Nonetheless, petitioners fail to raise this issue for review in accordance with Supreme Court Rule 14.1(a). Instead, they question only the enforceability of 42 U.S.C. § 671(a)(15) under § 1983 and the right of abused and neglected children who remain at home to enforce the AAA. Pet. at i. Indeed, petitioners never even acknowledge, let alone dispute, the Seventh Circuit's reliance on an implied cause of action in its decision to uphold the injunction.

Petitioners mention respondents' implied cause of action but once in the entire petition, and then only in a footnote. Id. at

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[2] The District Court also found that respondents could pursue their claims directly under the Act through an implied cause of action, Pet. App. at 35a-41a, and relied on that analysis in entering the preliminary injunction. Id. at 54a.

7 n.1. Yet even there, petitioners fail to present the issue in a way which would justify its review. Petitioners, purportedly relying on Wilder, erroneously equate the analysis under Cort v. Ash with that which governs cases arising under § 1983. Yet this Court in Wilder explicitly differentiated the two lines of cases. As this Court stated, the § 1983 analysis "is a different inquiry from that involved in determining whether a private right of action can be implied from a particular statute." 110 S. Ct. at 2517 n.9.

In sum, applying Supreme Court Rule 14.1(a) here, petitioners have waived review of the Court of Appeals' holding that children in DCFS' custody or under its supervision may enforce the Act directly through an implied cause of action. Since that question is neither "set forth in the petition, [nor] fairly included therein, [it should not] be considered by this Court." Id. See also Jones v. Hildebrant, 432 U.S. 183, 184-85, 188-89 (1977); Berkemer v. McCarty, 468 U.S. 420, 443 n.38 (1984).

B. Petitioners' Failure to Question Respondents' Implied Cause of Action Renders Certiorari Inappropriate.

Because petitioners have failed to challenge both of the Court of Appeals' holdings in accordance with Supreme Court Rule 14.1(a), this Court should deny their petition. As this Court has made clear, certiorari is inappropriate when, as here, a petitioner challenges only one of two independent grounds of a court of appeals' decision. The Monrosa v. Carbon Black Export,

359 U.S. 180, 183 (1959). Moreover, the Court of Appeals, like the District Court, clearly and plainly stated that its decision rested independently on its holding regarding respondents' implied cause of action -- making certiorari even less appropriate in this case. See Illinois v. Rodriguez, ___ U.S. ___, 110 S. Ct. 2793, 2798 (1990); Michigan v. Long, 463 U.S. 1032, 1041 (1983). Because the decision below will stand regardless of how this Court answers the questions presented by petitioners, granting certiorari here would require this Court to render an advisory opinion -- which it may not do under Article III's "case or controversy" requirement. Id. at 1042. Thus, in light of the "commitment of scarce judicial resources" which certiorari entails, City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985), this Court should deny the petition.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE QUESTIONS PRESENTED BY PETITIONERS.

Turning to the questions which petitioners have presented, the Court of Appeals correctly decided each. The court, in addressing them, followed Wilder, this Court's most recent application of § 1983 to the Social Security Act and its most relevant case here. Petitioners fail to raise any responsive argument not already properly addressed by the court below. Therefore, for this reason as well, certiorari should be denied.

A. The Court of Appeals Properly Applied Wilder in Holding That Children May Enforce the AAA's Reasonable Efforts Requirement.

In Wilder this Court articulated the standard which governs here, stating that a statutory provision, (1) if intended to

benefit a putative plaintiff, creates an enforceable right under § 1983:

> [(2)] unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, or [(3)] unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

110 S. Ct. at 2517 (citations and internal quotations omitted). See also Dennis v. Higgins, ___ U.S. ___, 111 S. Ct. 865, 871-72 (1991); Golden State, 110 S. Ct. at 448. Notwithstanding petitioners' assertions to the contrary, the Court of Appeals properly applied these three tests and correctly held that under § 1983, children who are repeatedly and regularly denied caseworkers under Illinois' child welfare system may enforce the AAA's reasonable efforts requirement.

First, the Court of Appeals stated that Congress clearly intended to benefit respondents in enacting the AAA, Pet. App. at 10a, a statement which petitioners neither can nor do dispute.[3] Second, the court correctly determined that the Act's reasonable efforts requirement imposes a binding obligation on DCFS. Id. at 10a-11a. As Judge Cummings stated, the reasonable efforts requirement, like the case plan, case review and monitoring

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[3] After criticizing the Seventh Circuit for allegedly ignoring the Wilder test, Pet. at 8, petitioners themselves disregard this first prong of Wilder altogether. See, e.g., Pet. at 11, 14 (referring to "two-pronged test"). But as this Court made clear in Dennis, its most recent § 1983 decision on this issue, a court must ascertain whether the plaintiff is a beneficiary of a statute in order to determine its enforceability. 111 S. Ct. at 871-72.

requirements, is "set[] forth in mandatory language" and is "tied indisputably to the funding provision." Id.

Petitioners first concede, Pet. at 13, and then (in remarks irrelevant to the question they seek to address) dispute the mandatory nature of the AAA's reasonable efforts requirement. Pet. at 17. But the language of the Act fully supports the Seventh Circuit's conclusion. The reasonable efforts requirement is an express and unconditional part of the contract between the State and the federal government and is included among the conditions which a State must satisfy in order to qualify for federal funds. In the provision entitled "Requisite features of State plan," the Act states, "In order for a State to be eligible for payments under this part, it shall have a plan...which... provides that, in each case, reasonable efforts will be made...." 42 U.S.C. § 671(a) (emphasis added). After focusing primarily and extensively on this and other language of the statute, Pet. App. at 6a-8a, 10a-11a, the Court of Appeals properly concluded that the Act binds States accepting its funding to make reasonable efforts. See Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 13 (1981) (courts are required to look first and foremost to language of a statute in assessing its enforceability).

The Act's legislative history provides further support for concluding that the reasonable efforts provision is privately enforceable by individuals. For example, prior to the Senate vote on the Act on June 13, 1980, Senator Cranston, the Act's

sponsor,[4] explained that the then-current statute contained only "very generalized provisions" regarding family preservation and reunification services and that those provisions had "had little specific impact upon a State's responsibility to provide services designed to prevent a child's removal from his or her home, or to help alleviate the problem which caused the child's removal in the first place." 126 Cong. Rec. 14766-67 (June 13, 1980). In contrast, he stated, the AAA "provide[s] specific requirements that states must include" in their State plan "to assure that in each case reasonable efforts be made...." Id. (emphasis added). Elsewhere, the legislative history supports the same conclusion. See, e.g., infra at 26-28. Thus, the Court of Appeals correctly concluded that through the reasonable efforts provision, Congress intended to and did impose a binding obligation on the States.

Looking to the third prong of Wilder, the Court of Appeals correctly determined that the right to reasonable efforts is sufficiently explicit to be judicially enforceable. Pet. App. at 11a-13a. In Wilder this Court stated:

> That the [Boren] Amendment gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the Amendment, but it does not render the Amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are some rates outside that range that no State could ever find to be reasonable and adequate under the Act.

110 S. Ct. at 2523 (emphasis in original).

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[4] As this Court has noted, in interpreting an act of Congress, the statements of the act's sponsor should be given substantial weight. Federal Energy Administration v. Algonquin SNG, 426 U.S. 548, 564 (1976).

In a parallel and searching approach, the Court of Appeals here acknowledged that "DCFS has substantial discretion in choosing the method it will use to implement the requirements of the AAA." Pet. App. at 12a. The court recognized and accepted that DCFS, in exercising that discretion, had chosen "to use caseworkers as the means through which these services are provided." Id. at 11a. Tracing Wilder's analysis, the court below then looked at DCFS' existing caseworker assignment process, as described by the District Court in its findings of fact. It then demonstrated how a court could easily assess whether DCFS' complete failure to assign caseworkers promptly comports with the Act's reasonable efforts requirement:

> [A]lthough a caseworker does not herself provide services, caseworkers are necessary to arrange for the provision of services by others. The caseworker is a "lifeline." When the caseworker is absent, no efforts can be exerted for preventive and reunification services.

Id. at 11a-12a. (citations omitted).

The Seventh Circuit, again relying on Wilder, then correctly stated that in such circumstances, "[t]he judiciary is...capable of determining whether the state is exerting 'reasonable efforts' to provide [the] services" required by the AAA. Id. at 12a. And here, the District Court correctly made that determination based on an extensive factual record -- a record showing that DCFS fails to make reasonable efforts in each case as a result of its failure to assign caseworkers to children and their families.

Petitioners assert that the AAA is unenforceable, relying on the Act's purported lack of an "objective benchmark" to measure

the reasonableness of DCFS' efforts. Pet. at 14. As the Court of Appeals recognized, petitioners are wrong. Applying the Act to the facts of this case, there is no ambiguity about the unreasonableness of petitioners' efforts to preserve and to reunite families. Because no caseworkers are assigned to the respondents, no efforts are expended at all. Pet. App. at 12a, 19a. Even if a "benchmark" might be helpful in construing the AAA's reasonable efforts requirement in other circumstances, no court would need any "benchmark" to enforce the Act here or to determine that these facts entail a violation of the Act's mandates. Moreover, as the Seventh Circuit recognized, Pet. App. at 7a, n.10, to the extent an "objective" reference point is required, federal regulations setting forth preventive and reunification services, 45 C.F.R. § 1357-15(e)(2), provide guidance comparable to the regulations mentioned in Wilder: the "factors which a State must consider in adopting its rates." 110 S. Ct. at 2522 (emphasis added).

Petitioners also attempt to distinguish Wilder from the decision below by pointing to the "substantial discretion" that the AAA provides to States in their implementation of its requirements. Pet. at 14 n.3, 18. They thereby ignore (at best) or misrepresent (at worst) this Court's recognition in Wilder of the "substantial discretion" afforded States by the Boren Amendment. 110 S. Ct. at 2523. In fact, the AAA provides States less discretion than that provided them under the Boren Amendment. Compare 42 U.S.C. § 671(a) (requiring the Secretary

to approve plan) with id. at 1396a(a)(13)(A) (requiring the Secretary only to find States' assurances satisfactory).

In a further attempt to distinguish it from this case, petitioners also misconstrue Wilder in their discussion of the Boren Amendment. Pet. at 13-14. The Boren Amendment requires States to set reasonable rates with reference to efficiently and economically operated facilities, as petitioners recognize; but it also includes a requirement, which the plaintiffs in Wilder sought to enforce and which petitioners here omit, that States "assure (sic) that individuals eligible for medical assistance have reasonable access...to inpatient hospital services of adequate quality." 42 U.S.C. § 1396a(a)(13)(A). Neither the statute nor the implementing regulations define "reasonable access" or "adequate quality." See e.g., 48 Fed. Reg. 56049 (1983) (rejecting proposal to define "reasonable access"). This Court in Wilder nevertheless concluded that courts are competent to determine both whether a State has set reasonable rates and whether it has ensured reasonable access to medical care of adequate quality. 110 S. Ct. at 2523.

Finally, Illinois' actions in the wake of Congress' enactment of the AAA in 1980 belie petitioners' suggestion that the reasonable efforts provision is too ambiguous to be considered part of the State's contract with the federal government. In 1985 the Illinois legislature amended the State's Juvenile Court Act to require judges to find that reasonable efforts were made before placing a child in DCFS' custody. P.A. 83-1517 (amending predecessor version of Ill. Rev. Stat. ch. 37,

para. 802-10). More importantly, two years later, the Illinois legislature enacted the Family Preservation Act, P.A. 85-985, which among other things, requires DCFS to provide family preservation services to families whose children have been removed or are at risk of being removed and to develop and implement a plan to make such services available throughout the State. Ill. Rev. Stat. ch. 23, paras. 2058.2, 5005, 5006a. See also DCFS Policy Guide 91.1 (March 28, 1991) (identifying services to meet reasonable efforts requirement in environmental neglect and domestic violence cases). Thus, with DCFS having accepted millions of dollars from Congress under the Act, petitioners cannot now claim ignorance. DCFS has long known that reasonable efforts are required of it under its AAA contract with the federal government.

Having correctly applied Wilder here, the Court of Appeals properly concluded that Congress created enforceable rights in the AAA's reasonable efforts requirement. Rather than render that provision meaningless, the Court of Appeals interpreted it to give full effect to the clearly expressed intent of Congress. See Wilder, 110 S. Ct. at 2519-20.

B. The Court of Appeals Correctly Held That Children Living At Home Under DCFS' Supervision Have Enforceable Rights Under the Act.

Having properly found that children have a right to reasonable efforts under the Act, the Court of Appeals declined to carve out a special exception for children at home under DCFS' supervision. As Judge Cummings stated, "the language of that statute does not reveal an intention by Congress to limit its

terms only to children actually in foster care outside the home, and the DCFS fails to provide a compelling reason to read such a distinction into the statute." Pet. App. at 18a (citation omitted).

The court's holding is well supported by the language and history of the AAA. First, Congress' emphasis on leaving children at home, on returning children to their homes as soon as possible, and on services to meet both these ends resounds throughout the AAA. Indeed, family preservation and family reunification are together a primary objective of the Act. Thus, the Act expressly imposes upon DCFS a binding obligation to make reasonable efforts to keep children at home prior to placing them in foster care. 42 U.S.C. § 671(a)(15). Other provisions of the Act also show the importance of the States' efforts to keep children at home. See, e.g., id. at § 627(b)(3) (requiring preplacement preventive service program); id. at § 672(a)(1) (requiring judicial determination that State made reasonable efforts prior to placing child in foster care).

Second, the Act's legislative history supports the Court of Appeals' holding. As Senator Cranston's remarks show, Congress enacted the AAA primarily to protect children against being removed unnecessarily from their homes and to minimize the human and financial costs which their removal entails:

> The human costs of failing to take whatever steps are available to prevent the removal of a child from his family are beyond calculation. The financial cost of placing a child in long term foster care -- running as high as $30,000 a year for institutional placements -- can become enormous,

> particularly in contrast to the cost of preventive services which could avert the necessity for removal or continued removal of the child.

125 Cong. Rec. 22686 (Aug. 3, 1979). Senator Cranston described the importance of the family preservation requirement even more forcefully on other occasions:

> [W]here removal can be prevented through the provision of home-based services, these agencies will be required to provide such services before removing the child and turning to foster care. These provisions... are among the most important aspects of this legislation. Far too many children and families have been broken apart when they could have been preserved with a little effort.

Id. at 14767 (June 13, 1980).[5] See also id. at 22683 (August 3, 1979) (reasonable efforts provision "critical to our efforts to reform the foster care system"). Other parts of the legislative history provides further support for the Court of Appeals' holding. See, e.g., H. R. Cong. Rep. 96-900, 96th Cong., 2d Sess. 46, reprinted in (1980) U.S. Code Cong. & Ad. News 1566 ("State plan must provide that in each case...reasonable efforts will be made..."); 126 Cong. Rec. 14645 (June 13, 1980) (Congressman Conable: funds conditioned on State providing

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[5] With these remarks, Senator Cranston integrated the Act's requirement that States make reasonable efforts to prevent children's placement with two provisions which petitioners conceded below to be fully enforceable -- the case plan and case review requirements. Like the structure of the Act itself, see 42 U.S.C. § 671(a)(15), (16), Senator Cranston's statement, made on the date of the Act's passage, shows Congress' intention that the three provisions be treated similarly and supports a finding that the reasonable efforts provision, like the case plan and case review provisions, is fully enforceable.

"services to preserve families"; Congressman Rousselot: States must make "every effort" to preserve families).

Petitioners ignore Congress' decision to provide the States over $300 million to fund family preservation services -- in contrast to the mere $1.6 million which Congress allocated to provide "appropriate" treatment in the "least restrictive" setting in Pennhurst State School and Hospital v. Halderman. 451 U.S. 1, 24 (1980). Petitioners then suggest that Congress' decision to fund preventive services in the Act through what is now Title IV-B of the Social Security Act, as opposed to through Title IV-E, somehow renders the rights of children residing at home unenforceable. Pet. at 19-20. Petitioners thereby demonstrate an appalling lack of understanding of the central purpose of the entire Act -- family preservation. The Court of Appeals gave petitioners' argument the short shrift it deserved. Given the clarity with which Congress has spoken in imposing this obligation upon States, the Court of Appeals properly elected not to second-guess the method by which Congress chose to defray their costs in meeting it. Pet. at 18a.

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH OTHER DECISIONS OF THIS COURT, THE COURTS OF APPEALS AND STATE COURTS.

Given its adherence to the Golden State-Wilder-Dennis test, the Court of Appeals' decision is consistent with this Court's rulings in other § 1983 cases. Likewise, the court's ruling is fully consistent with those in other circuits and in the state courts holding that the AAA, including its reasonable efforts

provision, is fully enforceable. Consequently, petitioners' claim of a conflict of decisions is meritless.

A. The Court of Appeals' Decision Is Consistent with this Court's Rulings in Other § 1983 Cases.

The opinion below fully comports with this Court's decisions in other § 1983 cases preceding Golden State, Dennis, and Wilder. In Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), for example, this Court held that federal regulations conferred upon tenants of federally subsidized housing the right to a reasonable allowance for utilities, a right which those individuals could privately enforce under § 1983. Id. at 423-32. Despite petitioners' claim to the contrary, the "guidelines" set out in the federal regulation relied upon in Wright, id. at 437 (O'Connor, J., dissenting), are no more concrete and directive than the "examples" of preventive and reunification services set forth at 45 C.F.R. § 1357.15(e)(2). See also supra at 23.

The opinion in this case is also consistent with Pennhurst, in which this Court construed 42 U.S.C. § 6010, the "bill of rights" in the Developmentally Disabled Assistance and Bill of Rights Act. This Court there found that Congress had not conditioned receipt of funding upon compliance with § 6010 and that the provision "does no more than express a congressional preference" for the policies there articulated. 451 U.S. at 19, 22-24. Based on its precatory nature, this Court refused to find the bill of rights enforceable. See also Wilder, 110 S. Ct. at 2518 (discussing grounds of Pennhurst decision).

By contrast, the provisions petitioners violate here are specific requirements "tied indisputably to the funding provision...[,] readily distinguish[ing this case] from Pennhurst...." Pet. at 11a. Indeed, Congress' words here could not be more clear: "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which..." provides that it will make reasonable efforts in each case prior to a child's placement to prevent her removal and after placement to facilitate her return to her home. 42 U.S.C. § 671(a)(15) (emphasis added). Likewise, in contrast to Pennhurst, 451 U.S. at 23, the AAA expressly authorizes the Department of Health and Human Services to withhold funding if the Secretary finds that a State has failed to comply with the reasonable efforts requirement, 42 U.S.C. § 671(b) -- "support[ing] the conclusion that the provision does create enforceable rights." Wilder, 110 S. Ct. at 2520. In short, as Pennhurst requires, in the AAA Congress spoke with a clear voice; with a command, not merely with a nudge. 451 U.S. at 17, 19.

B. The Court of Appeals' Decision Is Consistent with Decisions of Other Circuits Holding the Act To Be Enforceable.

Other courts of appeals which have considered the issue have each held that courts may enjoin violations of the AAA through § 1983. Timmy S. v. Stumbo, 916 F.2d 312, 315-16 (6th Cir. 1990) (granting injunction under § 1983 as remedy for unlawful exclusion of foster parents from administrative hearings); L.J. v. Massinga, 838 F.2d 118, 122-123 (4th Cir. 1988), cert. denied, 488 U.S. 1018 (1989) (granting injunction to remedy violation of

case plan, case review and reporting requirements); Lynch v. Dukakis, 719 F.2d 504, 509-12 (1st Cir. 1983) (granting injunction to remedy violation of case plan and case review requirements). See also Sockwell v. Maloney, 431 F. Supp. 1006 (D. Conn. 1976), aff'd, 554 F.2d 1236 (2nd Cir. 1977) (granting injunction under § 1983 for unlawful suspension of foster care payments under the AAA's predecessor).

Cases cited by petitioners are inapposite. In In re Scott County Master Docket, the District Court, applying the reasonable efforts mandate, concluded only that the State was not required, given the sexual abuse involved in that case, to maintain the children in their homes or return them to their families. 672 F.Supp. 1152, 1202-03 (D. Minn. 1987), aff'd sub nom. Myers v. Scott County, 868 F.2d 1017 (8th Cir. 1987). If anything, Scott County undermines petitioners' claims that federal courts are unable to apply the reasonable efforts mandate, and that the analysis undertaken below was unprecedented. See also infra at 35-36. Harpole v. Arkansas Department of Human Services, 820 F.2d 923 (8th Cir. 1987), is also readily distinguishable. There, in an abbreviated discussion, the court focused primarily on the appropriateness of the remedy sought, holding that an individual indirectly injured by the State's alleged violations of the Act could not seek damages in her case. Id. at 928.

Similarly, the alleged "uncertainty" among the district courts does not justify certiorari here. Pet. at 8-9. First, outside of the Seventh Circuit, the only district court to address the issue held the reasonable efforts requirement fully

enforceable. R.C. v. Hornsby, No. 88-D-1170-N, slip op. at 13-20 (M.D. Ala. April 19, 1989). Second, within the Seventh Circuit, the court below firmly resolved whatever conflict there may have been. Third, the pendency of other reasonable efforts cases in federal court renders certiorari even less appropriate. With only one court of appeals having addressed the enforceability of 42 U.S.C. § 671(a)(15), the issue -- if one exists -- is not ripe for this Court's review.

C. The Court of Appeals' Decision Is Fully Consistent with the Decision of State Courts Enforcing the AAA's Reasonable Efforts Requirements.

Certiorari is also inappropriate because the Court of Appeals' decision is consistent with those of state courts. State courts addressing the issue have been nearly unanimous in enforcing the Act's reasonable efforts requirement. See, e.g., In the Interest of Burns, 519 A.2d 638, 647-49 (Del. 1986); In the Interest of M.H., 444 N.W. 2d 110, 113 (Iowa App. 1989); In the Interest of Kenny F., 786 P.2d 699, 703-04 (N.M. App. 1990); In the Interest of S.A.D., 555 A.2d 123, 127-28 (Pa. Super. 1989). But see In re Carl O., 523 A.2d 1339, 1343 (Conn. App. 1987).

Other state courts have shown a similar inclination, enforcing state law provisions requiring reasonable efforts without hesitation. See, e.g., In re Victoria M., 255 Cal. Rptr 498, 503-05 (Cal. App. 1989) (reversing order terminating parental rights based on lack of reasonable efforts to reunite family); In the Interest of A.B., 444 So. 2d 981, 995-96 (Fl. App. 1983) (reversing dispositional order based on State's

failure to show reasonable services were provided to reunite family); In the Matter of Jones, 436 N.E.2d 849, 851 (Ind. App. 1982) (affirming termination of parental rights after finding reasonable services had been offered); In the Interest of A.M.K., 723 S.W.2d 50, 52-53 (Mo. App. 1986) (same); Matter of Sheila G., 462 N.E.2d 1139, 1140-41, 1150 (N.Y. 1984) (directing dismissal of termination petition based on agency's failure to provide reunification services to father); In re Nicole G., 577 A.2d 248 (R.I. 1990) (directing State to provide housing assistance in fulfillment of reasonable efforts obligation).

In short, the Court of Appeals decision is fully consistent with the decisions of state courts and other courts of appeals and prior decisions of this Court. Therefore, this Court should deny the petition.

IV. GIVEN ITS NARROW HOLDING, THE SEVENTH CIRCUIT'S DECISION WILL HAVE MINIMAL IMPACT ON OTHER STATES' CHILD WELFARE SYSTEMS.

The Seventh Circuit's holding was extremely narrow and limited to the unique set of facts before it. As a result, the court's decision will have little impact beyond the litigants and will have little or no effect on other States' child welfare systems. Therefore, this Court should not grant certiorari.

Before entering the injunction, the District Court conducted a lengthy hearing on respondents' motion for a preliminary injunction. It also considered petitioners' attempts to reorganize the Department, purportedly to remedy the system-wide problems depicted at the hearing. Finally, it reviewed lengthy submissions by the parties regarding DCFS' caseworker assignment

practices from July 1989 through February 1990. In short, the District Court entered its order only after an extensive and detailed review of the facts in dispute.

Based on its review, the District Court concluded that DCFS arranges for services for children and their families by assigning them caseworkers. App. at 9-12, paras. 2, 4, 6. Without a caseworker, the Department exerts no efforts to prevent the removal of children from their homes or reunite children with their families. Id. at 11-15, paras. 5, 9, 11. At the time of the hearing, DCFS regularly failed to assign caseworkers promptly. Id. at 15-18, paras. 13-19. Despite DCFS' reorganization, the Department continued to leave children without caseworkers regularly in late 1989 and early 1990. Id. at 19-24, paras. 21-27, 31-36. As a result, and given DCFS' reliance on caseworkers, children were irreparably harmed and denied the services to which they were entitled under the Act. Pet. App. at 53a-54a.

Endorsing the District Court's extensive findings of fact, id. at 5a, the Court of Appeals' holding was appropriately narrow: when a State assigns exclusively to its caseworkers the responsibility for making reasonable efforts to preserve and reunify families but regularly and systematically fails to assign them to abused and neglected children under its care or supervision, a court may remedy that systemic deficiency by entering a minimally intrusive preliminary injunction. Id. at 16a-17a. Thus, as its initial remand order portended, the Court of Appeals shaped its decision to closely fit the facts of this

case. Indeed, the injunction upheld below was fully consistent with the manner in which the State had exercised its discretion in attempting to meet its obligations under the Act. Compare id. with Wilder, 110 S. Ct. at 2525 (Rehnquist, C.J., dissenting).

On the other hand, in view of the discretion afforded all States under the AAA, similarly detailed findings of fact showing the vital role of caseworkers and systemic deficiencies in a State's caseworker assignment system may never be seen beyond Illinois' borders. See Winston v. Children and Youth Services of Delaware County, 748 F.Supp. 1128, 1133 (E.D. Pa. 1990) (no uniformity required in State systems for fulfilling reasonable efforts requirement). Therefore, the court's decision below will have only minimal effect on other States' child welfare systems.

Likewise, nothing in the Court of Appeals' decision suggests any erosion of the federal court's deference to the expertise of child welfare agencies, and nothing in the recognition of respondents' rights under the Act conflicts with this deference. Petitioners fail to justify certiorari with their "avalanche" argument, which Judge Cummings fully addressed:

> The district court's injunctive relief does not dictate a method of assigning caseworkers or interfere with the ability of caseworkers to exercise their own professional judgment on the job. The court is not creating federally enforceable rights to beds, monetary assistance, or housing. The injunction merely fulfills the minimal requirement of the AAA that reasonable efforts are made toward the goals of reducing unnecessary foster care placement and family disruption, and it does so through a method designed to maximize DCFS decisionmaking.

Pet. App. at 16a-17a.[6] Indeed, far from being an "unprecedented expansion" of the role of federal courts, Pet. at 21, the injunction here is consistent with and no more intrusive than the First Circuit's decision in Lynch. 719 F.2d at 514.

The federal courts' role in State's child welfare decisions is minimized by other considerations. The doctrines of collateral estoppel and abstention, for example, would regularly bar the federal court from "second-guessing" decisions in individual cases already active in a state court. See, e.g., Gardner v. Parson, 874 F.2d 131, 142 (3rd Cir. 1989) (AAA-based family preservation claim collaterally estopped by finding in Family Court proceedings). Moreover, any plaintiff surviving such hurdles may still be obligated to demonstrate systemic deficiencies in a State's plan (such as those shown in this case by respondents), as opposed to individual mistakes by individual caseworkers. 42 U.S.C. § 671(a). Finally, under Wilder, certain other plaintiffs may be unable to overcome the deference required of a court in its review of a State's compliance with the reasonable efforts requirement. 110 S. Ct. at 2523. Consequently, this Court should disregard petitioners' contentions that the decision below will overwhelm the federal courts with child welfare litigation.

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[6] As the Court of Appeals noted, the district court also took steps on its own to ensure that the injunction would be only minimally intrusive. Pet. App. at 12a-13a. The District Court refused to place a numerical limit on caseload size as requested by respondents and included in the injunction the three day benchmark set by petitioners themselves. Id. at 21-22, para. 37; id. at 55a, n.3.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully Submitted

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APPENDIX

STATUTES INVOLVED

1. 42 U.S.C. § 671(a):

Requisite features of State plan.

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which --

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at the State or local level, assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of Federal law;

(5) provides that the State will, in the administration of its programs under this part, use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part;

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A)

the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, C, or D of this subchapter or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, and (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to administration policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part or part B of this subchapter;

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose

claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

(13) provides that the State shall arrange for a periodic and independently conducted audit of the programs assisted under this part and part B of this subchapter, which shall be conducted no less frequently than once every three years;

(14) provides (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meet the requirement described in section 675(5)(B) of this title with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans approved under parts A and D, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part.

2. 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., et al.,	)	
	)	
Plaintiffs,	)	88 C 10503
	)	
v.	)	
	)	Judge Shadur
GORDON JOHNSON, et al.,	)	
	)	
Defendants.	)	

On June 21, 1990 the Court of Appeals entered an order partially remanding this case to this Court for the entry of factual findings as to the current delays in caseworker assignment and reassignment (the "June 21 Order"). This Court promptly set a status hearing to schedule the proceedings necessary for that purpose. Because of certain questions identified by this Court in that status hearing, defendants (for convenience hereafter referred to collectively as "DCFS") returned to the Court of Appeals, and the June 21 Order was modified on June 27, 1990 by the "June 27 Order."[1] This Court then set for July 18 both (a) an evidentiary hearing and (b) the contemporaneous advance submission by the parties of proposed findings of fact and conclusions of law--that was the earliest date that the parties could do so, given the preparation that they required for those purposes.

In part this Court directed the parties to include in their evidentiary submissions the information that would facilitate

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[1] Copies of the June 21 Order and June 27 Order are attached as Exhibits 1 and 2 to this memorandum opinion.

this Court's recapitulation of the situation as of the March 2, 1990 date of entry of the preliminary injunction order now on appeal, and that would do so in the context of the record that had been before this Court reflecting the earlier situation at DCFS.[2] That would effectively enable this Court to provide the Court of Appeals with a brief motion picture rather than simply a still photograph, inasmuch as DCFS' perceived lack of progress under its own Reorganization Plan despite the passage of many months was the key motivating factor in this Court's decision to enter the March 2 injunction order.

Shortly before the scheduled July 18 hearing date the parties advised this Court that they had been able to reach stipulations as to a number of the facts that would obviate the need for a testimonial hearing, so that they would meet the July 18 date established by this Court with paper submissions rather than testimony. Both did so at the end of the July 18 working day.[3]

On July 20 DCFS moved to strike virtually all of plaintiffs' submission, setting that motion for hearing on July 24.[4] To the

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[2] That requested presentation was viewed as helpful in directing this Court's attention to the specific record references to the before-and-after situations.

[3] Their Stipulations (cited here as "Stip. ¶--") are attached as Exhibit 3 to this memorandum opinion.

[4] That four-day gap (weekend included) conformed to this District Court's General Rule 12(e), which specifies two working days' prior notice by personal delivery of any motions to be presented in court. However, this Court frequently deals with

extent that DCFS' motion related to the proposed findings of fact ("Findings") tendered by plaintiffs, that criticism was indeed ironic: It essentially sought to object because plaintiffs' submission did deal, in an effective and informative way, with the background that was known to this Court when it rejected DCFS' purported implementation of its Reorganization Plan as having failed to deliver the results that it was supposed to accomplish, and thus as a failure to comply with the statutory "reasonable efforts" standard. And although DCFS' motion proposed to criticize plaintiffs as thus seeking to buttress their case before the Court of Appeals, in a number of vital areas DCFS' own Proposed Findings of Fact did exactly what DCFS' counsel were urging was improper on plaintiffs' part--for DCFS' submission also sought to argue its own case as a matter of advocacy.[1]

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matters on a more expedited basis where there is an emergency or where timing is otherwise critical, and where the opponent does not urge any prejudice by reason of the accelerated schedule. It would seem that type of accelerated treatment should have been sought here, given the Court of Appeals' specified July 26 deadline.

[1] For example, DCFS Proposed Finding 3 unconvincingly sought to reduce the stipulated 19-day average delay in cases transferred from Interim Services Teams ("ISTs") to DCFS area offices at the end of the 30 to 45-day period of initial services provided by the IST (Stip. ¶¶19, 3). DCFS would have this Court find that the 19-day delay somehow becomes a 5-day delay merely because the transferor IST technically (that is, on paper) retains responsibility for a case for 14 days after the file is transferred. From the prior hearings conducted by this Court and from other evidentiary submissions, such theoretical wholly-on-paper responsibilities do not at all serve the goal of actual caseworker assignments to people who are physically able to perform the various caseworker responsibilities. This Court has

Accordingly DCFS' motion to strike much of plaintiffs' submission has been denied. This Court does agrees that no Conclusions of Law of the type suggested by plaintiffs are called for--those were expressly included in this Court's preliminary injunction order--and so plaintiffs' recommended legal conclusions have not been taken into account here.

One last point should be addressed before turning to the Findings themselves. This Court has of course not gone forward with any proceedings in this action during the pendency before the Court of Appeals of the interlocutory appeal from the March 2 preliminary injunction--but that does not relieve this Court of its responsibility to be alert to developments potentially affecting the case. Thus this Court had also been fully aware of, and had been monitoring, the pendency of Wilder v. Virginia Hospital Association, 110 S.Ct. 2510, 2517-23 (1990).[4] It accordingly reviewed the Wilder decision as soon as it was handed down.

If this Court had viewed that decision as in any respect destroying the underpinnings of this Court's determination of plaintiffs' reasonable likelihood of success on the merits in

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therefore rejected DCFS' position as at war with the facts.

[4] That awareness of Wilder was not primarily stimulated by this case. As it happened, this Court had late last year, based on the Supreme Court's having accepted review in Wilder, deferred ruling on a motion in an entirely different case on its calendar--one that posed the identical substantive question of an enforceable private cause of action under the specific statute involved in Wilder (the Boren Amendment to the Medicaid Act).

this case--that is, as negating the existence of plaintiffs' private cause of action here--it would have considered that its judicial responsibility called for requesting a remand from the Court of Appeals to enable this Court to vacate the preliminary injunction because of that supervening development of law.[7] Potential mootness would always seem an appropriate consideration under such circumstances.

Accordingly this Court has indeed considered the effect of Wilder on its preliminary injunction decision here. It has determined that the Supreme Court's upholding of the Boren Amendment's "reasonable rates" standard as giving rise to private enforceable rights under Section 1983[8] strongly reinforces,

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[7] Indeed that is essentially what this Court did in United States v. Williams, 877 F.2d 516 (7th Cir. 1989). There this Court had, during the course of the criminal trial, rejected the proposed entrapment defense of codefendant Tedric Beverly ("Beverly") based on the then-established principles consistently announced by our Court of Appeals' decisions. After Beverly had been convicted by the jury and sentenced by this Court and had then taken an appeal, the United States Supreme Court reversed our Court of Appeals in United States v. Mathews, 108 S.Ct. 883 (1988), which involved the same entrapment question. This Court therefore requested the Court of Appeals to remand the case to permit this Court to determine whether adherence to the supervening Supreme Court decision in Mathews would have required it to submit defendant's entrapment defense to the jury (as this Court had refused to do at trial)--see this Court's opinion in United States v. Beverly, 699 F.Supp. 1256, 1258 (N.D. Ill. 1988). Such a limited remand was ordered by the Court of Appeals, this Court made the necessary determination and returned the case to the Court of Appeals, and the conviction was then affirmed at 877 F.2d 516.

[8] In addition to its rejection of the argument that "the obligation imposed by the [Boren] Amendment is too 'vague and amorphous' to be judicially enforceable" (Wilder, 110 S.Ct. at 2522), the Supreme Court characterized as an "objective benchmark" a standard that called on a court to review whether

rather than casting into any doubt, this Court's decision as to the "reasonable efforts" standard under the statute at issue here (and see the opinion to the same effect by this Court's colleague Honorable William Hart in Norman v. Johnson, 1990 U.S. Dist. LEXIS 6181, at 7-12 (N.D. Ill.), issued after this Court's opinion here and before the Supreme Court's decision in Wilder). This Court will therefore not request any further remand to enable it to consider vacating the preliminary injunction order now on appeal.

This opinion now turns to the Findings. As was true during the proceedings that took place before the entry of the March 2 preliminary injunction, this Court has found DCFS' position largely unpersuasive and that presented by plaintiffs largely persuasive. These Findings therefore draw largely on plaintiffs' submissions.

Findings of Fact

Initiation of Juvenile Court Cases

1. As to each member of the plaintiff classes, DCFS has filed or will file a petition for adjudication of wardship ("petition") in the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), alleging that the child is abused, neglected or dependent. 1-17-89 Tr. 26, 274.

2. DCFS' filing of a petition is based upon an investigation conducted by its Office of Child Protection,

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the State had "ensur[ed] 'reasonable access' to eligible participants" (id. at 2523).

("DCP"), one of whose investigators is assigned to each case. 1-17-89 Tr. 225, 275, 276. Such investigators do not themselves provide or arrange for any services for children or their families. P. Ex. 29: Denton Dep. 9-10.

3. When DCFS files the petition, it requests an award of temporary custody or the entry of a protective order. If it seeks the former, the temporary custody hearing usually occurs on the same day the petition is filed; but if DCFS recommends a protective order, the first court date is usually scheduled at some future date (at varying intervals) after DCFS files the petition. P. Ex. 29: Benson Dep. 19. Even where DCFS may seek temporary custody of the child, the child and the parents have a right to contest that request. Thus some of those cases, as well as those in which DCFS recommends a protective order, result in the Juvenile Court's referring the child to his or her parents' custody under a protective order. 1-17-89 Tr. 27-28. Conversely, when the Juvenile Court awards temporary custody, it appoints Gary T. Morgan or another person as custodian of the child.

Vital Role of the Caseworker*

4. When temporary custody is taken, a DCFS caseworker must be assigned in order to maintain the child's family ties, work toward reunification and ensure the child's well-being. To those ends the caseworker must search for relatives qualified to care for the child or locate a suitable placement; arrange appropriate counseling; complete school transfers where appropriate so the child's education is not interrupted; arrange family visitation; provide appropriate medical care; and generally assure the child's safety. 1-17-89 Tr. 247-58; P. Ex. 29: Mayberry-Dunn Dep. 15-16, Williams Dep. 22-27. In temporary custody cases the caseworker is also responsible for developing a written, individualized case plan and advising the Juvenile Court of the condition of the child and the family. 1-17-89 Tr. 31; 1-19-89 Tr. 786; P. Ex. 29: Mayberry-Dunn Dep. 15-16, Williams Dep. 22-27.

5. If no caseworker is assigned to the case, the child is usually dropped off at a placement without any information about his or her case, such as the nature of the abuse or neglect and the names of family members. Without that critical information,

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* DCFS' proposed Findings seek to denigrate the importance of caseworkers as mere "case managers, who arrange for the provision of services by others." But that is both (1) a mistaken emphasis on the mechanics rather than the human values involved in the relationship and (2) all of a piece with DCFS' consistent substitution of a theoretical paper structure of "responsibility" for the existence of a live person with actual hands-on responsibility for assuring that the needed services are in fact provided (see n.5, Finding 19 & n.10 and Finding 22.

neither reunification services such as visitation nor other vital child welfare services can begin. 1-17-89 Tr. 82; 1-18-89 Tr. 351-56.

6. In protective order cases the caseworker must secure services to preserve the family: individual or family counseling to ease or eliminate the crisis that led to the child's mistreatment; homemaker and housekeeping services so that the conditions of the home will not require the child's removal; substance abuse programs to enable parents to attend to their children's needs; help in obtaining food, shelter and medical care; and monitoring of the child's safety at home. 1-17-89 Tr. 168, 183; P. Ex. 29: Mayberry-Dunn Dep. 15-16.

7. DCFS may also contract with a private agency to provide child welfare services in both protective order and custody cases. Significantly, DCFS' own standards confirm the importance of personal contact by the assigned worker--it requires a private agency to see the child within 24 hours of receipt of the case. Plaintiffs' January 19, 1990 Response to Defendants' Report to the Court ("P. Resp.") Ex. 1, Int. 5(h).

8. When a case is transferred to a private agency, DCFS and the private agency share the responsibility for delivering services, so that the private agency delivers services directly while DCFS has a supervisory and monitoring role. 1-19-89 Tr. 699; P. Ex. 29: Mayberry-Dunn Dep. 39. DCFS caseworkers are jointly responsible with the private agency for preparing a case plan and providing an administrative case review, and they retain

ultimate responsibility for all facets of the case. P. Ex. 29: Williams Dep. 26. DCFS' caseworker also remains responsible for ascertaining whether there are appropriate relatives with whom to place a child. 1-17-89 Tr. 84. Certain services (such as psychiatric hospitalization for a suicidal child) may not be provided by a private agency, and the DCFS caseworker remains primarily responsible for obtaining or providing the consent for such services. 1-18-89 Tr. 359. DCFS' caseworker may also be required to authorize familial visits. 1-18-89 Tr. 363, 365. DCFS' caseworker is also responsible for planning for the long-term care of children in short-term private agency placements, a responsibility that includes authorizing a psychological evaluation, which is essential to the long-term placement of an adolescent. 1-18-89 Tr. 353.

9. Unless and until DCFS has assigned a caseworker, no services can be or are in fact provided to plaintiffs or their families. P. Ex. 29: Mayberry-Dunn Dep. 35, Denton Dep. 29. For example, a young child in DCFS' custody may be denied visits with her parents or siblings for several weeks (1-17-89 Tr. 89; 1-18-89 Tr. 342, 355-56, 363-65); be left in an inappropriate placement such as a shelter, even when appropriate relatives are interested in caring for her (1-17-89 Tr. 84-85); be denied sex abuse treatment, grief counseling or psychiatric care (1-17-89 Tr. 100, 111; 1-18-89 Tr. 359); be unable to attend school (1-18-89 Tr. 341-42); or be in DCFS custody without any case plan (Benson Exs. 1 and 5)--all while awaiting the assignment of a

caseworker.

10. DCFS' failure to provide caseworker-initiated services at early stages of its custody of plaintiffs is particularly harmful. 1-18-89 Tr. 367, 499-500; 1-19-89 Tr. 636; P. Resp. Ex. 2. Because family members are the most motivated during a time of crisis, immediate intervention is essential. 1-18-89 Tr. 389. Relatedly, the likelihood that children whom DCFS separates from their families will return home is directly related to the speed with which they receive reunification services. 1-18-89 Tr. 500; P. Resp. Ex. 3. Thus the greater the delay in providing such services during this critical period, the more likely it is that the child will never return home, and the goal of family reunification becomes more remote and less attainable. 1-17-89 Tr. 227; 1-18-89 Tr. 365, 367; 1-19-89 Tr. 629.

11. Children who reside at home under DCFS' supervision are also denied family preservation services and protection when no caseworker is assigned. 1-17-89 Tr. 183. For example, without a caseworker a child who had come under DCFS' supervision because her parent failed to provide adequate food went hungry again and had to leave her mother's home (1-17-89 Tr. 129-31); a parent who had been ordered to obtain drug treatment by the Juvenile Court and was willing to do so in order for her children to remain with her had no assistance from a caseworker in locating and enrolling in a drug treatment program (1-18-89 Tr. 402-06); and a child who was without an assigned caseworker to make home visits was further abused by his father and had to be removed from his

father's custody (1-17-89 Tr. 131-38).

12. When children remain at home, DCFS' failure to provide family preservation services quickly places them at risk and often results in their removal from home. 1-17-89 Tr. 129-37; 1-18-89 Tr. 512; 1-19-89 Tr. 629; P. Ex. 29: Johnson Dep. 29-30. Defendant Gordon Johnson testified (1-19-89 Tr. 630):

> [W]e didn't have a strong preventive effort at the front end of the system to try to keep children, as much as possible, at home with all the possibility of good services.

Without such an effort, the child's situation often deteriorates and DCFS must remove the child from her home. 1-17-89 Tr. 133-38; 1-18-89 Tr. 447, 512.

DCFS' Caseworker Assignment Practices at the Time of the Hearing

13. As of December 31, 1988 DCFS regularly delayed the assignment of cases to caseworkers capable of initiating child welfare services to the plaintiffs and their families, both in protective order and in temporary custody cases. In most cases DCFS did not assign a caseworker until at least two weeks after the first Juvenile Court date. In a large number of cases the delays lasted 30-45 days after plaintiffs' cases were initiated in Juvenile Court, with some delays in excess of 45 days. Stip. ¶1.

14. Delays described in Finding 13 occurred in cases sent from DCP to one of the ISTs. ISTs handled new temporary custody cases except sex-abuse cases. Other court cases--protective order and sex-abuse cases--were sent from DCP directly to one of

DCFS' area offices. There were similar 30-45 day delays in those cases. Stip ¶2.

15. In a large number of cases, even after caseworkers were assigned children lost the benefit of the assignment when their cases later became unassigned. That happened at various stages in a variety of ways. In cases initially sent to an IST, the caseworkers were assigned for only 30 to 45 days. Stip. ¶3. After the IST completed its tasks, each of its cases would be transferred to one of DCFS' four area offices. Id. There children were again often left for significant periods of time without a caseworker, and thus without family reunification and other child welfare services. 1-17-89 Tr. 33, 188; 1-19-89 Tr. 605-06, 680-81.

16. Similar gaps occurred when DCFS failed to reassign cases after caseworkers in DCFS' four area offices resigned, were terminated, transferred or took leaves of absence. 1-17-89 Tr. 32-33; 1-19-89 Tr. 685-89, 745; P. Exs. 23-25. Those gaps arose regularly as well, for DCFS caseworkers frequently transfer, take leaves of absence, are terminated or resign. Stip. ¶4. Children whose cases were previously assigned to those caseworkers generally went without a caseworker for 30 days after those absences began. Stip. ¶6. Moreover, some children's cases remained assigned to workers who had left DCFS months earlier. P. Ex. 23, 25.

17. Unassigned cases generally were a significant problem as of January 1989. At the end of September 1988 DCFS records

reflected that there were over 200 cases in Cook County that had been unassigned for over 30 days. P. Group Ex. 28-0 at 2. At the end of November 1988 DCFS records showed that 320 cases in Cook County had been unassigned for over 30 days, that 83% of those had been unassigned for over 60 days and that 63 cases had been assigned for over 100 days. P. Group Ex. 28-R; P. Ex. 26. In November 1988 Mark Moses, the DCFS employee responsible for monitoring the unassigned caseworker problem, actually wrote, "[T]here are good reasons to have those cases unassigned." Plaintiffs' Group Ex. 28-O. On December 13, 1988 the head of DCFS' Cook County operations wrote that unassigned cases in Cook County were on the rise. P. Group Ex. 28-P.

18. DCFS did nothing to expedite the assignment of caseworkers capable of delivering family preservation, family reunification and other services to children and their families. Delays described in the prior Findings were a direct result of DCFS' failure to require its personnel to assign cases promptly. P. Ex. 29: Benson Dep. 30-31. DCFS had no mechanism that systemically assured prompt caseworker assignment. 1-17-89 Tr. 241-42. For example, DCFS did not limit the time within which a supervisor must assign a case. P. Ex. 29: Benson Dep. 30-31.

19. DCFS also failed to develop a policy or procedure for reassigning cases of caseworkers who are absent, irrespective of the reason, for substantial periods of time. 1-19-89 Tr. 685-89, 745; P. Group Ex. 28-H, J, N, O, R. In fact DCFS' witnesses testified that there was a "management decision" not to reassign

cases of workers on leave and that DCFS had no procedure whatever regarding cases of workers on leave for a period up to five weeks. 1-19-89 Tr. 745; and see Stip. ¶¶ 5, 6. Often DCFS made paper assignments by assigning a caseworker in name only. 1-17-89 Tr. 190. Such paper assignments left the child without services, for in reality the child lacked a caseworker.[10] 1-19-89 Tr. 688; 1-17-89 Tr. 110-11; Benson Ex. 5.

DCFS' Caseworker Assignment Practices: 1989-90

20. By July 1989 DCFS had implemented three of the four elements of its plan to remedy the caseworker assignment process:

(a) the Early Response Package, reducing the paperwork necessary to transfer a case from DCP investigators to the IST and follow-up caseworker teams (1-19-89 Tr. 606);

(b) the expansion of the IST program, designed to allow DCFS to assign all new custody cases to an IST before transferring them to an area office; and

(c) the Family First Initiative ("Family First"), designed to provide intensive services to children remaining at home with their parents.

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[10] At the risk of belaboring the point, this past pattern of behavior on DCFS' part ties directly into the lack of credibility of DCFS' argument referred to in n.5. It also reinforces the appropriateness of this Court's looking at DCFS' past performance (or more accurately its lack of performance) when this Court evaluated the situation at the time it entered the March 2 preliminary injunction order.

D. Supp. Submission (August 4, 1989) at 29-32; Stip. ¶¶ 8, 9, 11 and 12. On July 16, 1989 the final element of DCFS' plans, the division of DCP into the same geographic areas as the area offices, was completed. Stip. ¶4.

21. Despite the changes, significant delays persisted in assigning caseworkers at the outset of cases. For children whose cases were initiated in Juvenile Court in July 1989, DCFS took an average of 9.3 days between the initial court appearance and the assignment of an IST caseworker and 19.1 days between the transfer from the IST to the assignment of a follow-up caseworker. P. Resp. at 3.

22. IST caseworkers retain full responsibility for a case for 30 to 45 days. Stip. ¶3. After that initial period DCFS can extend the assignment of an IST caseworker for an additional two weeks, but during the extension the caseworker's role is limited to court appearances and to arranging placement changes. P. Resp. Ex. 1, Int. 3(k). IST does not retain responsibility for the remaining caseworker functions such as monitoring a child's safety or arranging parent-child visits.[11] Moreover, the practice of extending IST responsibility is not always followed. P. Supp. Submission (February 12, 1990) at 12 n.9.

23. As a result of DCFS' policies and practices, children whose cases were initially served by an IST were without a caseworker capable of delivering the full array of reunification and other child welfare services for an average of one month

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[11] See n.5.

within the first two to three months. P. Resp. at 3. Those caseworker gaps occurred at a time crucial to the reunification of plaintiffs with their families. Id. Exs. 2, 3.

24. Neither the IST nor the Family First program functioned as planned. In July 1989 approximately one-third of new custody cases went directly from DCP to area offices without IST intervention. P. Resp. at 6. In those cases DCFS failed to assign a caseworker until, on average, 10 days after the first Juvenile Court date. Id. at 6-7. As for Family First, children whose cases were initially assigned to that program experienced significant delays after the expiration of the two to three months during which Family First served the family before assignment of a caseworker at the area offices. 1-19-89 Tr. 602; P. Resp. Ex. 9.

25. DCFS' claims that 77% of July 1989 cases were assigned from DCP to IST in under 5 days were based on a log that IST maintained for new cases. P. Resp. Ex. 1, Int. 2(b). But that log did not include the date on which cases were really assigned at IST. Id. Ex. 4, Benson Dep. 28-29; Stip. ¶17. Instead the information contained in the log and the basis for DCFS' representations was merely the date that the early response package "was received at IST." Defendants' January 31, 1990 Reply to Plaintiffs' Response to Defendants' Reports to the Court ("D. Reply") at 14. DCFS had no record of when the cases were actually assigned to an IST caseworker capable of providing child welfare services to plaintiffs and their families. P. Resp. Ex.

4, Benson Dep. 17-18, 28-29.

26. DCFS' changes did not address the gaps created when caseworkers resigned, transferred, were fired or took a leave of absence. Stip. ¶25. Given the number of and frequency of transfers and the high turnover rate of DCFS caseworkers, DCFS' failure to attempt to deal with that problem was especially dangerous. Goad Ex. 9 at 1, 3; P. Group Ex. 28-O at 1; P. Ex. 29: Denton Dep. 22. If a caseworker were absent for less than 30 days, the supervisor merely monitored the case without handling the everyday service needs of the family. D. Supp. Submission (August 4, 1989) at 36. When absences extended beyond 30 days, DCFS' policy and practice continued to permit supervisors to leave cases previously assigned to the absent caseworker unassigned for 30 or more days. Stip. ¶¶ 4-6, 25.

27. Cases that were reassigned during a caseworker's absence were reassigned en masse to a single caseworker, who by the nature and volume of the reassignments was not and could not be expected to provide services. P. Resp. Exs. 10, 11.

28. Even after implementation of DCFS' plans, its procedures failed to fix responsibility for assigning a caseworker promptly. DCFS assigned Mark Moses to monitor unassigned cases but did not require him to take action when he observed the existence of unassigned cases. P. Resp. Ex. 6, Moses Dep. Gloria Lewis, DCFS' Associate Deputy Director for Cook County Operations who supervises the administrators of the four area offices, received monthly reports listing unassigned

cases. P. Resp. Ex. 7, Lewis Dep. Nonetheless, she played no role and had no responsibility in ensuring the assignment of those cases. Id. at 15, 47-49.

29. John Goad and Chris Benson, to whom DCFS entrusted the responsibility of closely monitoring compliance with the Early Response Package, reviewed DCFS' performance on only two occasions in all of 1989. John Goad Affidavit (January 31, 1990) ("Goad Aff.") at 3-4, attached to Defendants' Reply of the same date. DCFS instead simply relied on its expectations (really its wishful thinking) that cases would be assigned. Defendants' Reply at 4, 14.

30. DCFS finally revised the IST logs in December 1989 to record the date on which a caseworker was actually assigned. Affidavit of Chris Benson (January 31, 1990) ("Benson Aff.") at 9, attached to Defendants' Reply; Stip. ¶18. DCFS then submitted December logs for one IST team to this Court. Benson Aff. Ex. F. Of the 20 cases that DCFS selected for the Court's review, only 9 were assigned in 5 days or less. Id. All the remaining cases were assigned only after significant delays, with several of them assigned 10 days or more after the first Juvenile Court date. Id.

31. On December 7, 1989 Goad wrote in an internal memorandum that the percentage of cases not routed to IST within 5 days had <u>increased</u> since July 1989, a trend he described as "disappoint[ing]." Goad Aff. Ex. B.

32. IST logs from January and February 1990 also

demonstrated continuing delays in IST caseworker assignment. In January and February 1990 DCFS sent approximately 150 cases to IST for assignment of a caseworker. Stip. ¶21. In several cases IST logs did not contain adequate information to determine the date on which a caseworker was assigned. Id.

33. DCFS did not assign a caseworker within 5 days of the first Juvenile Court date in 56 of the remaining 146 cases sent to IST in January and February 1990. Id. DCFS thereby fell significantly short of the goal that it had established for itself: assignment of a caseworker within three to five days. 1-17-89 Tr. 227, 149; Defendants' Proposed Findings of Facts and Conclusions of Law (January 30, 1989) at 44; Defendants' Supplemental Reply Regarding Defendants' Reports to the Court and in Opposition to Plaintiffs' Motion for Preliminary Injunction (February 12, 1990) at 3.

34. In February 1990 alone DCFS did not assign a caseworker within 5 days of the first court date in 40% of the cases sent to IST (33 of 82) and within 10 days of the first court date in 22% of those cases (20 of 82). Of the February 1990 IST cases, 12% (11 of 82) were left unassigned for more than three weeks. Excluding cases that had been screened in advance, DCFS failed to assign a caseworker within 5 days of the first court date in 60% of the February cases.[11]

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[11] By agreement of the parties in open court on July 24, DCFS' February 1990 logs have been made Exhibit A to the Stipulations and are accordingly attached as part of Exhibit 3 to this opinion.

35. DCFS also continued to leave cases unassigned, on the average, for nearly three weeks after IST completed its tasks. Stip. ¶24. DCFS also failed to modify its policy or its practices against the reassignment of case in the area offices. Stip. ¶25. As a result, DCFS left cases previously assigned to absent caseworkers unassigned for an average of 30 days. Id.

36. System-wide caseworker assignment problems grew as well. Thus the total number of unassigned cases grew from 232 on June 30, 1989 to 404 by the end of 1989, parallelling the pattern of the previous year. P. Resp. Ex. 13. And the number of cases unassigned for over 30 days doubled over the same period of time. Id.

37. For an extended time period of many months during the pendency of this case, this Court had left DCFS wholly unconstrained by any order setting time requirements for caseworker assignments, because it had taken DCFS at its word that its adoption and implementation of the Reorganization Plan represented the "reasonable efforts" required by the statute. It was only after DCFS' performance had failed so substantially, with no adequate explanation offered by DCFS for that failure and with DCFS' unfulfilled generalized predictions having demonstrated a total lack of credibility, that the preliminary injunction order now on appeal was entered as required to satisfy DCFS' statutory "reasonable efforts" obligation. In doing so this Court (a) rejected plaintiffs' request for an order requiring such assignments to be made within 24 hours as an

unrealistic requirement, (b) accepted DCFS' representations that a three-working-day requirement was capable of accomplishment (although DCFS did object to the entry of any such order) and (c) deferred the effective date of the preliminary injunction order by approximately 90 days, thus accepting DCFS' position as to the amount of additional time that it would need for that purpose.

Milton I. Shadur
United States District Judge

Date: July 25, 1990

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 21, 1990

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

ARTIST M., et al. Plaintiffs-Appellees, Nos. 90-1742 and 90-1764 v. GORDON JOHNSON, et al. Defendants-Appellants.	] Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.] No. 88 C 10503]] Milton I. Shadur, Judge.

ORDER

The preliminary injunction entered by the district court requires that the Department of Children and Family Services (DCFS) assign a caseworker within three working days from the time plaintiffs' cases are first heard in juvenile court as well as within three working days from the time a previously assigned caseworker relinquishes any portion of a case. DCFS voluntarily instituted a Reorganization Plan which has as its goal the reduction of delays in caseworker assignment to three to five days in most cases. It is unclear from oral argument before us and from the record what amount of delay currently exists between (1) a hearing in juvenile court and the assignment of DCFS caseworkers to that case, and (2) reassignment of a case to a new caseworker following the relinquishment of any portion of a case by the previously assigned caseworker. The record is also unclear on how far away DCFS is from attaining the goals outlined in that Plan. Accordingly, this appeal is remanded for the limited purpose of permitting the district court to hold an evidentiary hearing, if deemed necessary, and to enter written findings with respect to the extent of the present delay in caseworker assignment and reassignment and the extent to which DCFS has met its goals under the Plan. The district court should also inform us if a preliminary injunction is still necessary. We request that the findings be made as soon as possible, but no later than July 26, 1990.

The defendants' motion to strike pages 463 to 475 of the Appendix to the plaintiffs' brief is denied.

United States Court of Appeals

JM

For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1990

CORRECTED

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

ARTIST M., et al. Plaintiffs-Appellees, Nos. 90-1742 and 90-1764 v GORDON JOHNSON, et al. Defendants-Appellants	]Appeals from the United]States District Court]for the Northern]District of Illinois,]Eastern Division.]No. 88 C 10503]]Milton I. Shadur, Judge.

O R D E R

Our order of June 21, 1990 remanded this appeal to the district court for entry of factual findings with respect to the current amount of delay in caseworker assignment and reassignment. We now modify that order and direct the district court to enter written findings on the following factual issues as they existed at the time the injunction issued: (1) the amount of delay between a hearing in juvenile court and the assignment of DCFS caseworkers to that case, (2) the amount of delay between the time a caseworker relinquishes any portion of a case and the time a new caseworker is assigned, and (3) the extent to which DCFS has met its numerical goals, as set forth in our June 21, 1990 order, under the Reorganization Plan. We request, as before, that these findings be made as soon as possible, but no later than July 26, 1990.

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
JUL 18 1990
MILTON L SHADUR CLERK
UNITED STATES DISTRICT COURT

ARTIST M., et al.,

Plaintiffs,

v.

GORDON JOHNSON, et al.,

Defendants.

No. 88 C 10503
Hon. Milton I. Shadur

STIPULATIONS

Plaintiffs Artist M., et al., by their attorneys, and defendants Gordon Johnson and Gary T. Morgan, by their attorneys, hereby jointly stipulate to the following facts.

Conditions as of December 1988

1. As of December 31, 1988, the Department of Children and Family Services ("DCFS" or the "Department") regularly delayed the assignment of cases to caseworkers capable of initiating child welfare services to the plaintiffs and their families. In most cases, DCFS did not assign a caseworker until at least two weeks after the first Juvenile Court date. In a large number of cases the delays lasted 30-45 days after plaintiffs' cases were initiated in Cook County Juvenile Court, with some delays in excess of 45 days.

2. These delays occurred in cases sent from DCFS's Office of Child Protection ("DCP"), the Department's investigative arm, to one of its Interim Services Teams ("IST"). IST handled new temporary custody cases except sex-abuse cases. Other court cases, namely protective order and sex abuse cases, were sent from DCP directly to one of DCFS' area offices. There were similar 30-45 day delays in those cases.

3. In IST cases, the IST caseworker retained responsibility for the case for 30-45 days. After IST caseworkers completed their tasks, the IST supervisor called the Service Coordination Unit ("SCU"), which then assigned the case to a caseworker team at the appropriate area office. IST then sent the case file to the supervisor of the team through DCFS's messenger service, which operated three times per week. The supervisor of the team then would assign the case to a caseworker.

Reassignment of Cases

4. Follow-up caseworkers in the four area offices frequently transfer within the Department, take leaves of absence, are terminated, or resign from their positions in DCFS's area offices. (The following

discussion will refer to these caseworkers in the aggregate as "absent caseworkers.")

5. As of December 31, 1988, DCFS policy allowed team supervisors 30 days in which to make decisions regarding the reassignment of the absent caseworkers' cases.

6. DCFS's management policy and practice permitted supervisors significant latitude and discretion in decisions regarding reassignment of cases. The cases of absent caseworkers generally were not reassigned for 30 or more days after their absences began.

Changes in DCFS's Caseworker Assignment System

7. In 1988, DCFS administrators became aware of delays in caseworker assignment. As part of their efforts to remedy those delays, on January 1, 1989, the Division of Cook County Operations ("DCCO") initiated use of an Early Response Package for cases transferred from DCP to IST.

8. The Early Response Package contains those investigation materials necessary to obtain a Juvenile Court order, enabling cases to be transferred out of DCP prior to completion of the entire investigation.

9. In February 1989, DCFS began sending certain protective order cases to private agencies under the Family First program, for provision of intensive home-based services by the private agencies.

10. By August 31, 1989, Family First had provided services to 169 families in Cook County under Juvenile Court protective orders.

11. Between January and May 1989, the Department added two new IST teams, bringing the total to four units, with the goal of eventually assigning all court cases to IST.

12. On May 22, 1989, DCP began transferring all new temporary custody cases involving sex abuse to IST.

13. DCFS's Cook County region contains four area offices, covering distinct geographic areas. On June 1, 1989, the four IST teams were geographically aligned with the four Cook County area offices.

14. On July 16, 1989, the DCP teams were geographically aligned with the four area offices.

15. In September 1989, the Department initiated a Home of Relative Initiative, which called for most cases involving children placed in foster care with relatives to be transferred to private agencies for case

management and services, with a goal of reducing caseloads across the entire DCFS system.

16. On November 13, 1989, DCP began transferring protective order cases to IST. New court cases (other than previously opened cases, Home of Relative cases, or Family First cases) went from DCP to IST as of that date.

17. During 1989, the DCP and IST administrators monitored initial assignment of caseworkers at IST through, among other means, use of logs which reflected receipt of the case at IST.

18. In December 1989, the IST logs were modified to reflect actual assignment of an IST caseworker.

Conditions as of 1989 and Early 1990

19. Cases transferred from DCP directly to area offices during 1989 experienced delays similar to those in December 1988. Cases transferred from IST to area offices during 1989 experienced average delays of 19 days.

20. In January and February 1990, DCFS sent approximately 165 cases to IST for assignment of a caseworker. In some cases IST logs did not contain

adequate information to determine the date on which a caseworker was assigned.

21. DCFS assigned a caseworker within five calendar days of the first court date in 90 (61 percent) of the remaining 146 cases sent to IST in January and February 1990. The Department failed to assign a caseworker within five calendar days in the remaining 56 cases (39 percent).

22. In January and February 1990, DCFS did not assign a caseworker within 10 calendar days of the first court date in 25 cases sent to IST, or 17 percent.

23. In January and February 1990, DCFS did not assign a caseworker within three weeks of the first court date in 14 cases sent to IST, or 10 percent.

24. As of March 2, 1990, cases transferred from IST to area offices were unassigned for an average of 19 days.

25. Defendants did not change DCFS's policy regarding the reassignment of cases previously assigned to absent caseworkers between December 31, 1988, and March 2, 1990. DCFS's practice as of March 2, 1990, left cases previously assigned to absent caseworkers unassigned, on average, for 30 days.

Dated: Chicago, Illinois
July 18, 1990

Respectfully submitted,

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Michael G. Dsida
Susan Tone Pierce
Julie L. Biehl
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Attorneys for Defendants

C = Cocaine Identified Problem

A 011025

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	IST/WHK/L	SCR I.D.	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TO
Menchaca Rocha Maria		2349 So Kolman 762-4680	Dralia Menchaca (3) Lucia Menchaca (4) UNP	2/7/90	2BO2	3021820	2/2/90	F.D. 2/16/90		
Collins Cheryl		1530 Harlem #2E Riverforest 366-9497	Mason Kendall 11/5/78	2/1/90	2B48	3684600	2/2/90	F.D. 2/23/90		
Estrada Sandra		3426 W. 22nd Cicero	Estrada Francisco 2/21/87	2/26/90	2B02	3702763	2/2/90	TR 1-31-90		
Dawson Veronica		5315 W. Potomac Chgo. 626-5473	Dawson Simone 9-30-86		2B02	3708342	2/5/90	2/23/90		3/20
Gray Brenda	C	3540 W. Congress Pkwy 638-1162	Mearps Brittny 11/20/88	2/1/90	2B44	3232000	2/5/90	2/1/90		
Pendleton Elaine		3137 W. Lexington Chgo.	Pendleton Claude 11/13/87	2/13/90	2B02	3708734	2/5/90	FD 2/21/90		
Buford Verdale		3566 W. Congress Chgo	Pendleton Sabrina 2/23/89		2B02	3708734	2-7-90	FD 2/21/90		
Buford Verdale		5566 W. Congress Chgo.	Buford Shawnee ESC	11/89	2B02	3736741	2-7-90	FD 2/6/90		
Campbell Brenda	C	7845 S. May Chgo. 733-1693	Campbell, Patrick	2/26/90	2B02	3710954	2-8-90	F.D 2/13/90		
Dennis Lita	C	850 Waller and Chgo. IL	Dennis (Request) NWP	1/51	2B44	3710674	2-19-90	FD 2/21/90		3/20

Exhibit A

INTERIM SERVICE TEAM - CASE LOG TEAM 2006 29 AREA

C = Cocaine Identified Problem

A 011026

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-TM1 IST/MTK/DT	SCR # I.D.#	EARLY DISP CASE REC.	W/SAR DATE	NEXT CT DATE	XFER DATE/TO
Schroeder Gloria		303 Des Plaines Ave Forest Park		2/13/90	2848	186270	2/14/90			WAO
Littleton Rwanda		11432 So Indiana Chgo. Also 9231 Cottage Grove IL	Littleton, Jimmy 4-1-85 11432 So Indiana	2/14/90 K	Wolfenbarger 2842	V8978300 3711A8A	2/13/90	FW 2-1-90		2BC
			Littleton, Jaime 4-4-85 (313) 747-8930		Wolfenbarger 2842	T32X600 04	2/13/90	CT 3-16-90		3/
Jude LaDoe	C	1213 So Harding Chgo.	Powell, Michael c/o Rebecca RYAN 1220 W James Chgo. #312 465-7943		Wesson 2848	247206 T33X200	2/13/90	FW 1-16-90 CT 3-12-90		WAO 2BCX3
			Burley, Antwan 8-14-87							
			Hope, Donald 11-14-87							
NUNNERY, BEVERLY		713 N. LATROBE CHGO. ILL.	FAULKNER, JENNINGS c/o NUNNERY, PEARL 713 N LATROBE CHGO ILL. 65462		2841 Fisher	273420 R3-10-8200	2/14/90	FW 11/6/90		WAO 2BCX3
			NUNNERY, CHAUNCEY c/o NUNNERY, PEARL 713 N LATROBE CHGO ILL. 65462							
			NUNNERY, SHANA c/o NUNNERY, PEARL 713 N LATROBE 5th. Floor 65462							
PEREZ, MARIA		2705 W 24th St. Apt C CHICAGO, ILL. 247-0295	PEREZ, GRACIELA RUBIO, CRYSTAL 2705 W 24th St	2/22/90	JOHN RYAN Fisher 2/14/90	228104A T33X-30 00	2/14/90	FW 2/6/90 CT 3/12/90		2BC 3/

INTERIM SERVICE TEAM - CASE LOG TEAM 20 AREA

A 011027

C = Cocaine Identified Problem

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-TMI 1ST/MUK/DT	SCR # I.D.#	EARLY DISP CASE DEC.	TC/SAN DATE	NEXT CT DATE	XFER DATE/TO
CASTILLO STELLA		2734 S. DRAKE CHICAGO, ILL	HERNANDEZ NANCY 12/19/88 HERNANDEZ, ANTONIO 9/10/89 2734 S DRAKE	2/29/90	2814	361065	2/14/90	P.O 12/28/90		3804 (P 2/21 P.C Transferred
ANONO, JOANN		4316 W CORTEZ CHICAGO	ANONO, SHERRY 7/16/76 4316 W CORTEZ		2617	322341A		P.O. 2/5/90		
PHILLIPS, TINA		1032 N. HAMLIN CHICAGO, ILL.	PHILLIPS, JAMES % TINA PHILLIPS (mom) 1032 N. HAMLIN 772-6666	1/SE FH: 2/90 PO: 2/87		1302 W.N	2/14/90			
Adames, Roslyn	C	2006 So 17th Maywood, ILL.	Classie Reed 2006 So 17th Maywood (708) 450-4466		2618	289616		P.O 11/28/90		3003 01 Transferred 5/11/91
Donley Corine	C	4903 W. Van Buren 2nd. 26-2857	Donely Natinie		2848	312763A	2/14/90			2B?
Hopkins Jewley		5950 W Warren 626-2043	Hopkins Barnell 11/9/73 Chip Reed		2818	363462A	2/20/90	F.U. 1-4-90		3P TRA
White Ursula Arthur		568 N. Laramie 2 FL.	White Faith 0 HMK • Richard(s) • Arvine(s)	HSE	2873	313358 A	2/20/90	P.O. 2-15-90		2B? 4H
Moore Shaun	C	(Work Release) 3597630 (MGM MIRAGE HOUSE) 2844 W Washington	SHANE TRACEE 13 " JACKSON 11 " ERIC 6 " JOHNS 7	2/22/90 K+110	2618	2654120	2/21/90	P.O. 2-15-90		
Chapman Shelia		1429 N Hatrobe	ELAINE 11-8-77 Dajmone Julius 11-8-75 Simon 12-13-84	Roseburg	2814	1348900 1346-3 m	2/22/90 "			
Umar, Amir Kullenkamp, Linda	C	1339 W 47th St	Umar, Anthony 5 Angela 2 Amanda 3 HMK 523 2612 Ormine Umar	Roseburg	2814	345162 D	2/26/90	P.O. 3-12-90		

Schaub Laura	7407 Elmwood Park	Wpw Grp 3 (8) (2)	Contact Reading	1st/wrk/DT Softsmith 3/1/90	322344A	2/26/90	F.D. 3-6-90		2804 11
Campbell Kimberly	6124 J. King Dr #15	" HWP Smith Darrell 2/1/88	Reading	2nd/wrk/DT Smith 2/26/90	373556A	2/25/90	F.D. 3-19-90		
Steele Mary	6543 So St Lawrence Chgo. Apt 608 Stlawrence 667-6210	" Jackson Travis 11-26-77 3 times " Travis " Willie	Reading	3875 Smith 2/26/90	374368A F398100	2/28/90 (H574900)	FD 3-22-90	Closed 4/18/90	

INTERV SERVICE TEAM - CASE LOG TEAM 2P 2 AREA

C - Cocaine Identified Problem

A 01

	FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-THI IST/MRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TY
(1)	(LINK EARLY RESPONSE) HORTON, MATILDA (OLDER MATTIE)		1844 LELAND EVANSTON #2W	HORTON, ARCADIAN (6M) (9-27-91) (ADD REL NEEDS TO BE A PARTY) 328-5786	3/1	2540 LELAND PJ 3/5/90		2/1/90			
(2)	(UNCOMPLETE E.R.) DUARTE, ADELINA		3809 W MONTROSE #3W CHICAGO 60618	CARRILLO, CYNTHIA BM (9-26-90) UNKNOWN	2/16	2605 W ADAMS GH 3/5/90	3407834	2/5/90			
(3)	[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]		[illegible]	[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
(3)	AS 60, 04 STEWART, LINDA		540 ALICE ST EVANSTON, IL 60120 708-742-5030	Stewart, Jezael (child) - Camaya (child) - Selena (child) - Jessica (child) - Teresa (child) - Terrence (child) Marcia, Ziggy (child)	2/14	2640 OS 2/8	2340056	2/14/90			
(4)	5 2ND BOURBON - RED'S DR #A DEADFORD, MARGARET		1053 S BISHOP 960-9117	DEADFORD, BRANDON (child) BKP	2/14	2833 WARREN 6/11 2/9	3223174 7425000	2/14/90 2/15/90			
(5)	MS, [illegible] 60, [illegible]		630 W EVERGREEN #1601	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

INTERIM SERVICE TEAM - CASE LOG TEAM 2B _____ AREA

February 1991

C = Cocaine Identified Problem

A 01

	FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-THS IST/WRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/T
(6)	SEAVERTS, BARBARA #22		1233 W. MORSE CHGO 60626 761-6548	(LA) SEAVERTS ATLANTIS FHB (1/31/91) Anna Moore 9/91 3 6mos (1 10/31-1990) Chic Comm	No not a new Hou, Alone att. thalpo 2/23 IP	2898 Gallus RL 2/14	37328 7 A	2/6/91			
(7)	WALKER, KATRINA #24		1144 N LARABEE CHGO, IL 60610 Home Visits (Cates)	EVANS, ANTOINE HHF (1/16/87) EVANS, ANTONIO (2/27/91)	2/27	2647 C Parsons PJ 2/14	373351 A	2/6/91			
(8)	RICHER, KAREN #22 7th & STATE ELGIN - 742-1040		HGP'd Taylor Alexander & Bernice 2419 W MONTROSE 878-9645	TAYLOR, ALEXIS (2/20/91)	2/23/90 mom	2849 BARNES GH 2/14 22 2/10	365257 A	2/6/91			NA
(9)	BROTHERS SUE ANN #A, 77 BOJAY, MICHAEL	✓	UNBOOKICILED Ruth Gen's Hse	BOJAY, BLAKE (02) (10/21/88) SHELTER LM 709-265-8262	3/5	LUSETTI RL 2/14 2814 2818	373383 A T358760	2/6/91			
(10)	WILLSTON, BERNETTA #24	✓	UNBOOKICILED 1148 N MILWAUKEE (Corp P.A. Address) 501 W Park Ridge	WILLSTON, ETTA (83) (9/18/74) WILLSTON, JASON (04) (11/27/90)	2/5-6M 2/26	CAS/Array RL 2/20	373584 A&B 7433900	2/6/91			NA
				WILLSTON, BERNETTA L (05) (5/24/90) Norma Herrera 8345 S Justine 779-7384							
(11)	MERCED, ALFONSO #A22, 24		5115 N. OAKLEY CHGO, IL 728-9925	MERCED, ROGER (03) FHB (1/21/78) Mary Guerrero Guardian 3050 N Lawndale 267-0424	2/22	2/22	373919A TOM 8300	2/16/91 2/22/91			
				MERCED, MARY (04) (4/14/86) MERCED, ANDREW (05) (5/24/87)							
(12)	BARNETT, JUANITA #24		P.O Box 4962 - Sparks, Nev 89432 702-329-4907 1435 SUMMIT ELGIN, IL (708) 741-1609	CORREA, VERONICA (5/30/91)		2840 Ellis GH 4/21 2840 Hampton	Not in system 1710296 368830	4/6/91			
(13)	ALLENS, JANICE #24		2044 DODGE EVANSTON	ALLEN, JANICE (6/15/88)	3/1		372326 A				

INTERIM RVICE TEAM - CASE LOG TEAM 2B_ _AREA

C = Cocaine Identified Problem

A 011 '7

	FAMILY NAME	C	ADDRESS	CHIDREN/WHEREABOUTS	First Contact	DCP-TMI IST/MRK/DT 2640	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
(14)	Davis, Joyce		1817 S Seaside Hanover, In (788)537-4425	Joyce, Angel (dtr) (step)	3/14	Homeless PJ 3/27	1D3264 H R781820	3/24 3/24	3/24 4/24	3/24 4/24	

41

INTERI.. SERVICE TEAM - CASE LOG TEAM 2B ____ AREA

Feb., 1990 C = Cocaine Identified Problem

2B0697 EAO

A 011039

FAMILY NAME	C	ADDRESS	CHIDREN/WHEREABOUTS	First Contact	DCP-TMI IST/NRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE / NEXT CT DATE	XFER DATE/TH
Major, Cecelia Cyc Assessment		5041 So. Federal Apt. 901	DeAngelo Roberts Quentez Roberts HMP	CYC 2/5/90	2B14 DB 3/9/90	368424A J379000	2/2/90	2.25 supv. 1/19/90 Calc. 19 CT: 2-23-90	6/6/90 Closed
Phillips, Mary From SAO		LKA 7811 S. Ellis 11730 S. Lowe St. Catherine Shelter	01) Selena Phillips 02) Timothy N. Phillips FHP Central Dept	FHP 2/9/90	2B43 F.E. 3/6/90	277982E V0893100	2/2/90 2/14/90	T.w 2/1/90 Calc. 19 CT: 2/9/90 CT: 4/9/90	4/9/90 SAO 2B0?: Phillips Returned To EAO 2B63 Sup. 10
			Fula Molea 5200 So. Princeton 955-1290						
			05) Cocretia Blackwell 12) Curtis Phillips FHP Central Dept.	FHP					
			Velma Ackerson 2015 W. 64th 476-2184						
			07) Robert Phillips 4911 N. Kenmore Mabel Johnson 626-7235	FHP 2/9/90					
Burns, Kimberly		6557 S. Eberhart	01) Jasmine Bullard NMR Lois Jackson 9911 S. Michigan 995-1537		2B13 KW 3/6/90	997316? 1156200	2/7/90	T.w: 1/19/90 C.T.: 2/6/90	Case to Kim T. SAO/EST
McCoy, Barbara	✓	6531 So. Lowe #630	03) Maretha McCoy NMR Ruthie McCoy 3547 S. Federal 548-6351 #307		2B45 J.H. 2/6/90	367819A H5529000	2/8/90	T.L: 1/29/90 Calc: 19 CT: 3/13/90	3/5/90 EAO 2B09 to:
			04) Stephanie McCoy NMR Theresa Jackson 1426 S. Normal Riverside 849-5247						
Braithwright, Kathy From SAO		3240 E. 91st St.	Braithwright, Kathy HMP	2/16/90	2B43 F.E. 2/13/90	369541A H5559000	2/6/90 3/1/90	F.D.: 2/28/90 225 Supv. Calc: 19 CT: 4/4/90	4/9/90 SAO 2B0? Barnett

Feb 1990

INTERI.. SERVICE TEAM - CASE LOG TEAM 2B AREA 2B0697 EAD

A 011040

C = Cocaine Identified Problem

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-THI IST/MRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE / NEXT CT DATE	XFER DATE/TM
Viverette, Curry Kazee, Roselynn Fm SAO 2/13/90		1614 Ellis Ford Heights 758-5414	Tiffany Kazee HMP	2/23/90	2B16 D.B 2/14/90	226233C M969960	2/8/90	225 Sup: 4/10/90 Cal: 7 CT: 3/23/90	4/14/90 SAO - Nancy 2B33 Cook
Gardner, Keith Gardner, Shirley		4409 So. Halsted 624-7943	Gardner, Melonie HMP	2/21/90	2B14 R.W 2/14/90	372554A Y427900	2/14/90	2.25 Sup: 2/5/90 Cal 17 CT: 3/23/90	4/14/90 EAD 2B62 Cook
Moore, Linda Levi, Wilbert SAO		426 Calumet Blvd. Harvey, Il. From SAO 2/16/90	(03) Moore Jamani Loyola Hosp		2B46 L.J. 2/14/90	371196A T359900	2/14/90	T.W. 2/13/90 Cal 13 CT: 3/13/90	3/13/90 SAO - Nancy 2B62 Cook
Taylor, James		1245 W. 69th St.	(04) Scott, James 12/20/74 ESE/Cameo	2/23/90	2B47 R.W. 2/14/90	373867A Y456900	2/16/90	T.R: 2/14/90 Cal: 13 CT: 4-4-90	5/4/90 SAO 2B2 Cook
Hendricks, Deborah CYC assign 2/22/90	✓	4101 S. Federal	(03) Hendricks, Latricia Evanston Hosp. T.R. 3/22/90	CYC	2B98 DB 2/20/90	184477D H560900	2/21/90 2/26/90	F.D: 3/22/90 T.R: 3/22/90 Cal: Cal 17 CT: 3-27-90	4/11/90 SAO 2B62 Cook
Beeks, Moneia		2450 S. State Apt. 302	(03) Antoine Vaughn ESE/Cameo		2B45 D.H 2/22/90	161776I T520890	2/21/90	T.R: 2/21/90 Cal: 7 CT: 3/21/90	3/22/90 SAO 2B62 Cook
			(04) Anthony Vaughn Wyler's Hosp						
Adams, Tracy	✓	5140 S. Loomis 2nd Flr.	Amanda Adams Twin Antoine Adams Steven Adams HMP	2/21/90	2B45 F.E. 2/20/90	248940D T396870	2/21/90	F.D: 3/8/90 T.W: 3-8-90 Cal: 7 CT: 4/10/90	4-11-90 SAO THP 2B62 Cook
Macon, Kathy	✓	7752 S. Racine Apt 3C 846-4760	Raven Moon Reynold " Rhonda " HMP		2B43 L J 2/21/90	374738A H566900	2/26/90 3/9/90	F.D: 3/14/90	Antoine Family Fun Visit 21 Lee
Jones, Ruth CYC 2/22/90	✓	5311 S. Bishop	Aisha Adams Fatima " Shanita " HMP	2/21/90	2B45 DB 3/21/90	153136 S999800	2/26/90 3/26/90	P.O. 2/23/90 Cal T.R. 3/21/90 CT 4/12/90	4-18 SAO 2B42 Cook

Feb 1990

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C = Cocaine Identified Problem

INTERI.. SERVICE TEAM - CASE LOG TEAM 2B ____ AREA

A 011041

FAMILY NAME	C	ADDRESS	CHIDREN/WHEREABOUTS	First Contact	DCP-THS IST/WRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
Baker, Marianne		2430 S. State Apt. 305	03) Carl Baker	C4C	2845	374954A	2/22/90	T.W 2/22/90		
C4C 2/28/90			04) Catherine Baker		DB 3/27/90	Y4739000	3/1/90	Cal 17		
			[redacted] Baker					CT: 4/2/90		
			06) Geneva Rutherford ESC							
			08) Travis Rutherford ESC							
Bailey, Annette		2330 S. State Apt. 602 808-0960	(03) Ali Bailey ESC	2/28/90	2845	375146A	2/27/90	T.W -2/23/90		
					LW 3/27/90	Y4759000	3/1/90	Cal -		
								CT- 4/3/90		
Sanders, Bettina	✓	5147 S. Prairie 2nd flr 538-1868	Antonio Sanders Hosp Carters Children Hosp	3/7/90	2842	3716629		F.D - 3/23/90		
					SG 3/21/90	36028100	2/27/90	2.25 3rd qtr. 6-19-90 CT. Cal: 13		
Parker, Geneva	✓	3835 S. Federal #102	Parker, Robert Hosp Mercy Hosp	3/7/90	2847	336698		F.D. - 3/8/90		3/2.
					LH. 3/26/90	H0848900	2/27/90	2 [illegible] 4/13/90		

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS		First Contact	DCP-TM# IST/WRK/DT	SCH # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
Tracy Hancock	X	9351 Lo Mercer	Courtney	Hmp		2B4/3	3660430	1/0	7/1	2/13	
						AS 3½		2/1			
Kelly Ellerby Katherine Lindsey		7831 Lo Cornell	Porscher	Hmp	IP 2/7	2B15	3481158	2/1	7/1	2/21	
						4S 2½		2/7			
Valerie Reed		7743 Lo Crandon	Omar Jamila	Hmp Unmarked Patrol Car	1/5	2B4/2	3711180	2/7	7/1	3/4	
						LC 2½	Y426-90	2/13			
Mary Phillips Referred to Court	TST	unk Advised to contact Parole Officer at home address	Lakeisha Timothy Timothy Courtney Robert	711B	LB/S	2B4/3	2779826	2/7	7/1	2/9	
						10/7 EC 2½	X084-81-246		2/1		
Gene Shannon	X	13249 Lo Lawrence	Jacques Tabina Aisha	Hmp	9/16	2B4/3	3233318	2/5	7/1	2/23	
						CW 2½	R61787	3/2 —	2/2		
Kathy Breidenstein		3340 East 91st Assigned out of area	Patricia	Hmp		2B4/3	2695418	2/6	9/1	2/25	
						2/1			2/2		
Margaret Bradford		7953 Lo Bishop Assigned out of area	Shalonda	Hmp		2B4/3	3725178	2/6	9/1	4/20	
						2/1	Y425-90		2/2		
Brenda Campbell		7845 Lo Mary Assigned out of area	Patrick	Hmp		2B4/2	3711855A	2/0	7D	2/13	
						2/1		2/6	2/2		
William Patterson Jeanette Bennett		9344 Lo Kenwood Referred to family Pres	Adrian Figueroa	Hmp		2B14	3713474	2/6	9/1	2/13	
								2/6	2/3		
Morgan Jefferson	X	1231 9 So Union	Mitchell	Hmp	LB/S	2B4/3	3644330	2/0	TM 2/1	2/1	
						LC 2½	T322-90	2/6	2/1		

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INTERIM SERVICE TEAM - CASE LOG TEAM 28 AREA South

C = Cocaine Identified Problem

A 011043

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS		First Contact	DCP-TM# IST/WRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
Nina Chay	X	1236 W. 103rd	Tierra Nicole Charles	HMR	<CF>	LC 2/8	3708447 T324-90	NO 2/7	TC 1/31	3/1	
Vincente Cuevas (Assigned ont. Jan. 6		1614 Ellis Ford Hts, Ap 259	Tiffany Latrice Cuevas	HMP	2B1/4	2/1	2262330 M269-86	NO 3/4	1/17 1/31	2/23	
Tawanda Littleton Assigned ont.		LKA: 9251 So Cottage Ave to West Chest	Jimmy Tyson 2-23-76	HMR	2B 2/1	2/1	3711984 T325-90	NC 3/8	TC 4/1	3/16	
Chace Green Carolyn	X	1446 Portland Chgo Hts Rd	Alonzo	HMR	2B4/6 HS 2/13	1769436 M448-85-00	2/4		TC 2/15	3/23	
Diane Pole	X	LKA: 10359 So. Edbrooke	Cassandra Carolyn Valley	HMR	2B 1/4 CN 2/14	3705444 Y3915-90	NO 2/9		TW 2/17	2/21	
Brenda Lewis		47 E. Marquette	Brittany	HMP	2B 1/4 AS 2/14	3733237 T077-84-00	2/13 2/22		TW 2/8	6/6	
Be Lucinda Vasquez	X	8409 So. Exchange	Rudolpho Salazar	EXC	2/1	2B4/3 GW 2/14	3325168 Y432-90	3/13	TW 2/6	3/23	
Diane Brown		1479 W. 114th Pl.	Kyron	ESC		2B4/2 HS 2/16	3727704 M182-86	NO 3/13	TC 2/6	3/4	
Yvette Wyllie Lee Reid		14512 So Parnell Riverdale	Jesse	HMR	2/21	2B4/6 HW 2/16	3707850 T327-90	NC 3/14	TW 1/11	2/23	
Linda Moore		426 Carlemont Blvd Harvey, Ill.	Jasmine	Hayden Whop		2B4/6	3711964 T359-90	2/14	TW 2/15	2/25	

C = Cocaine Identified Problem

A 011044

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-THI IST/MRE/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
Alicia Turner		Whereabouts unk	Michael Rhonda Brian		2B42 AS 2/16	3726235A T360-90	NO 2/15	TC 2/13	4/3	
Ronald Hogan	X	301 E. 130th, #9	Ronda		2B15 CH 2/16	3738955A	2/16 3/6	TC 2/14	3/22	
Sharon Dorsey		6018 S. Racine	Samantha	Hmp	2B42 CH 2/6	3729465A	NO 2/20	TC Scrapped 3/16	3/7	
Opal Calvin		7040 S. Eberhart	Jamiel	Hmp	2B42 AS 2/23	2651468B C005-88-01	NO 2/22	TC Scrapped 3/20	3/19	
Stacey Steffin	X	22606 Latonia Riceton PK	Pookie	Hmp	2B46 HW 2/23	3722014A T369-90	2/22	MD Not 3/22	4/24	
Karen Land	X	9949 S. Winston	Lara	Hmp	2B42 AS 3/1	3739994A	NO 3/23	TC Scr. 3/16	3/8	
Mary Steele Assigned		6018 S. St Lawrence out of area to West I St	Jamie	Hmp 2B29	2B42	3742184A	NO 2/26	TC Scr. 3/23	3/22	
Kimberly Campbell Assigned		6028 S. Cottage out of area to West I St	Dalvin	Hmp 2B29	2B42	3735564A	NO 2/27	TC Scr. 3/17	3/19	
Kathy Mason	X	7752 S. Racine Referred to Family First	Ronen	Hmp	2B14	3741386	NO 2/21	TC Scr. 3/22	3/19	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 88 C 10503
	)	
GORDON JOHNSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In December 1988 plaintiffs filed this action as a class action seeking declaratory and injunctive relief pursuant to the Adoption Assistance and Child Welfare Act of 1980 ("AAA"), 42 U.S.C. §§620-629, 670-679a--either under 42 U.S.C. §1983 ("Section 1983") or perhaps via direct action--and under the Due Process Clause. Plaintiffs simultaneously filed a Motion for Preliminary Injunction and a Motion for Class Certification.

Upon presentation of plaintiffs' motions, defendants concurred in the propriety of certifying two classes of plaintiffs:

> Class A: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), who are or will be in the custody of Department of Children and Family Services ("DCFS") or in a home under DCFS supervision by an order of Juvenile Court and who are now or will be without a DCFS caseworker for a significant period of time.
>
> Class B: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in Juvenile Court who are or will be placed in DCFS' custody and who are or will be without a DCFS caseworker for a significant period of time.

This Court entered a memorandum order certifying both classes, granting plaintiffs' request for expedited discovery and setting plaintiffs' Motion for Preliminary Injunction for an early evidentiary hearing. After that hearing (the "Hearing") was held, with extensive evidence presented by both sides, the parties presented their post-Hearing submissions.

Defendants in this action are DCFS Director Gordon Johnson ("Johnson") and DCFS Guardianship Administrator Gary Morgan ("Morgan"). 1/ DCFS is the state agency charged with, among other things, investigating allegations of child abuse and neglect throughout Illinois and caring for children and families who are the victims of child abuse and neglect. This action is concerned solely with cases in the Cook County Region.

Plaintiffs complain that DCFS has a policy and practice of failing promptly to assign a caseworker to court cases following the issuance of a temporary custody or protective (or

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1/ Morgan testified that although he is named personally by the Juvenile Court as the custodian of children placed in the temporary custody of DCFS, day-to-day decisions regarding those children are made by DCFS personnel who are designated agents of the Guardianship Administrator and who are located in the Area Offices, Division of Child Protection, Interim Service Teams, Emergency Services Center and other units directly responsible for serving children in the care of DCFS. Morgan has no line authority over those persons, nor does he have any responsibility for developing generally any policies with respect to the care of children in DCFS' custody, or specifically with respect to the assignment of caseworkers. Accordingly, although named as a defendant, Morgan does not have any responsibility for the alleged practices and policies challenged in this action.

supervision) order and of failing promptly to reassign court cases when a caseworker goes on leave, is terminated or resigns. Plaintiffs claim that alleged policy and practice violates both AAA and the Due Process Clause.

This Court has previously deferred issuance of its findings of fact and conclusions of law for two reasons impacting importantly on the availability and propriety of preliminary injunctive relief:

1. the known imminence of post-Hearing Supreme Court decisions in key areas affecting the core of plaintiffs' claims and

2. DCFS testimony at the Hearing as to its then recent adoption and ongoing implementation of a restructuring plan to address caseworker assignment delays directly.

Now the end of the Term has come, the Supreme Court decisions have indeed been handed down, and it appears that they may perhaps have gutted much if not all of plaintiffs' potential predicates for obtaining relief. This memorandum opinion and order addresses the case in its present posture.

As for plaintiffs' claim under Section 1983, Will v. Michigan Department of State Police, 109 S.Ct. 2304, 2312 (1989) has now announced that no action against a state or against its officials qua officials (the capacity in which Johnson is in fact sued here) can proceed under that statute:

> We hold that neither a State nor its officials acting in their official capacities are "persons" under §1983.

To be sure, Will, id. at 2311 n.10 (citations omitted) tempers that seemingly unqualified pronouncement with an "of course" hedge that draws upon the familiar fiction that informs Ex parte Young and its progeny--that a State cannot act unconstitutionally, so that any state official who violates anyone's constitutional rights is perforce stripped of his or her official character:

> Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State."...This distinction is "commonplace in sovereign immunity doctrine,"...and would not have been foreign to the 19th-century Congress that enacted §1983....

But in this instance that stated limitation on the newly-announced Will ruling marks a need for further inquiry rather than the end of the matter.

As stated at the outset of this opinion, plaintiffs ask for declaratory and injunctive relief. But the injunction they seek is not the garden-variety limited restraint on an individual defendant's conduct. Instead it calls for mandatory relief that would, if granted, impose a major financial burden on the State of Illinois. As Edelman v. Jordan, 415 U.S. 651, 666 (1974) said: 2/

2/ Although the Edelman discussion (like that in Quern [cited next in the text] and all the other cases treating with the issue now under consideration) occurs not in a Section 1983 case but in the Eleventh Amendment context, Justice Brennan's dissenting opinion for four Justices in Will, 109 S.Ct. at 2312 seems accurate in stating:

> Like the guest who wouldn't leave, however, the

> We do not read Ex parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature.

If the reason the State cannot be sued under Section 1983 is indeed the bar against invading the sovereign's fisc without its consent, that identical consequence would flow from the decree sought by plaintiffs, though nominally injunctive in form and though nominally issued against state official Johnson rather than the State itself. It is of course true that for Eleventh Amendment purposes the Court has distinguished between retrospective relief (held impermissible) and prospective relief (held permissible), stating in Quern v. Jordan, 440 U.S. 332, 337 (1979)(citations and footnote omitted): 3/

> In Edelman we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment....We rejected the notion that simply because the lower court's grant of retroactive benefits had been styled "equitable restitution" it was permissible under the Eleventh Amendment. But we also pointed out that under the

Footnote Continued

> Eleventh Amendment lurks everywhere in today's decision and, in truth, determines its outcome.

> But it is not necessary for today's purposes to choose sides between the majority and minority opinions in Will. What is most significant is that Edelman and like cases draw on the notion of the State as sovereign, the identical concept that the Court majority in Will relies on in finding the State cannot be a Section 1983 "person."

3/ Will, 109 S.Ct. at 2309 n.6 rejects one of the petitioner's arguments there as "no more than an attempt to have this Court reconsider Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), which we decline to do."

> landmark decision in Ex parte Young, 209 U.S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury....The distinction between that relief permissible under the doctrine of Ex parte Young and that found barred in Edelman was the difference between prospective relief on one hand and retrospective relief on the other.

But will that Eleventh Amendment parallel extend chapter and verse to Section 1983? Is form to prevail over substance, so that this action will lie under Section 1983 in accordance with Will's n.10 exception? Or does the real-world major financial impact of the relief demanded by plaintiffs mean that Will's general rule barring Section 1983 actions against the State and its officials as surrogates for the State is to control here?

If the latter is the proper reading of Will, it would sap of any real force the cases on which plaintiffs have placed their principal reliance for purposes of AAA-related relief: L.J. v. Massinga, 838 F.2d 118 (4th Cir. 1988); Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983); and see Del A. v. Edwards, 855 F.2d 1148 (5th Cir. 1988). Both L.J., 838 F.2d at 123 and Lynch, 719 F.2d at 509-10 held AAA privately enforceable under Section 1983, and to that extent they would clearly be overturned by such a construction of Will. As for Del A., the Court of Appeals there vacated the panel opinion and granted rehearing en banc (862 F.2d 1107 (5th Cir. 1988)), following which the case has been dismissed February 28, 1989. And of course Will would then moot defendants' reliance on Spielman v. Hildebrand, 873 F.2d 1377, 1386 (10th Cir. 1989),

which had expressed "considerable doubt whether [AAA] confers any substantive rights that can be the subject of an action for damages under section 1983."

Finally, if Will were to foreclose plaintiffs' access to Section 1983, their right to relief in this action would have to stem--if at all--from one or both of (1) an implied direct private action for defendants' claimed violations of AAA or (2) plaintiffs' stated claim under the Due Process Clause. Each of those alternatives bears examination here.

AAA unquestionably does not by its terms afford parties in plaintiffs' situation an express cause of action. And plaintiffs have really not responded to defendants' Proposed Conclusion 8, which points to the increasingly restrictive reading that the Supreme Court has given to implied private actions--a much more demanding standard than Cort v. Ash, 422 U.S. 66 (1975) was initially thought to have established. Most recently our Court of Appeals has spoken to that issue in King v. Gibbs, 1989 U.S. App. LEXIS 8718, at 15-16 (7th Cir.):

> The Supreme Court, in Cort v. Ash, set out a four-part test to determine whether a private right of action should be implied from a statute:
>
> > First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"...? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted).

> In its recent pronouncements, the Court has reaffirmed the use of the Cort test but has also made it clear that the principal focus is on the second of the Cort factors--whether the legislature intended to create a private cause of action. See Cannon v. University of Chicago, 441 U.S. 677 (1979); Touche Ross & Co. v. Redington, 422 U.S. 560, 568 (1979). The first and third of the Cort factors are aids in determining that intent, Touche Ross, 422 U.S. at 575-76; see also P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, The Federal Courts and the Federal System 946 (1988), and, by negative implication, it is unclear whether the fourth Cort factor--whether the cause of action is generally thought of as a matter of state concern--has any continuing significance. But see Merrill Lynch, Pierce, Fenner & Smith v. Curran, 465 U.S. 353, 393 (1982)(Court noted that fourth Cort factor favored implying private right of action under a provision of the Commodities Exchange Act.). In sum, unless a congressional intent to create the right of action "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 (1981).

At least until otherwise demonstrated, then, it must be considered that AAA provides plaintiffs no direct ticket of entry to this federal court.

As for plaintiffs' claim sounding in due process, DeShaney v. Winnebago County Department of Social Services, 109 S.Ct. 998 (1989)--albeit in a different context--has most recently reconfirmed the restricted scope of States' obligations to their citizens under notions of substantive due process. DeShaney emphasized the nature of the Due Process Clause as a charter of negative liberties rather than as an affirmative guaranty.

To be sure, in the course of its DeShaney discussion the Court reconfirmed the existence of "certain limited circumstances [in which] the Constitution imposes on the State affirmative duties of care and protection with respect to particular individuals" (id. at 1004-05, and see generally the entire discussion in Part II of the opinion, id. at 1002-07). But DeShaney specifically did not retreat from the principles announced in the Court's two decisions during the October 1985 Term delimiting the scope of substantive due process (id. at 1003):

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," Davidson v. Cannon, [474 U.S.] at 348, 106 S.Ct., at 670 [1986]; see also Daniels v. Williams, [id.] at 331, 106 S.Ct., at 665 [1986] ("'"to secure the individual from the arbitrary exercise of the powers of government,"'" and "to prevent governmental power from being 'used for purposes of oppression'")(internal citations omitted); Parratt v. Taylor, 451 U.S. 527, 549, 101 S.Ct. 1908, 1919, 68 L.Ed.2d 420 (1981)(Powell, J., concurring in result)(to prevent the "affirmative abuse of power"). Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Both Daniels, 474 U.S. at 331 (emphasis in original) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property") and Davidson, id. at 347 ("In Daniels, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property") emphasized that the harm complained of must have

been intended by the public official, rather than negligently inflicted. And because DeShaney dealt with petitioners to whom the State did not owe the special level of responsibility that runs in favor of persons in state custody, the Court was not called on to specify whether the Daniels-Davidson standard of intentionally inflicted harm or some lesser benchmark was required in the "special relationships" situations discussed in Part II of the opinion. As to persons in plaintiffs' position, then, a double question exists: whether they stand in the "special relationships" category and, if so, what standard is prescribed by the requirements of substantive due process.

In summary, the posture of plaintiffs' claims appears to be this:

1. Input is required from both sides as to whether Section 1983 (assuming arguendo that DCFS were held to have violated AAA) has been rendered unavailable to plaintiffs by Will.

2. Unless plaintiffs can demonstrate otherwise, any contentions they have advanced as to an implied private cause of action created by AAA itself must be rejected for lack of subject matter jurisdiction.

3. Any contention that plaintiffs seek to ground in the Due Process Clause depends on the standard applicable to such contention--whether that of intentionally inflicted harm (a standard that plaintiffs clearly cannot meet) or something less (a question whose answer may

depend on what that "something less" is). 4/

Both sides are directed to file contemporaneous supplemental submissions on those legal issues in this Court's chambers on or before August 4, 1989. Because it may also be relevant to determine what has happened since the Hearing to the plan described in defendants' Hearing testimony, defendants are ordered to include a brief statement of the current posture of that plan as part of their submission. This action is set for a status hearing at 9 a.m. August 15, 1989 to discuss (1) whether anything further will be required in the latter respect and also (2) the ultimate disposition of the preliminary injunction motion.

Milton I. Shadur
United States District Judge

Date: July 24, 1989

4/ Both sides should also review our Court of Appeals' two-week-old en banc decision in Easter House v. Felder, No. 86-2164, slip op. (7th Cir. July 11, 1989). Easter House cuts such a wide swath out of Section 1983's coverage, and it is so new, that its potential implications even for a substantive due process claim such as that advanced by plaintiffs here should be looked at.